1996

Alayna J. Culbertson, J. Blaine Johnson, Eva C. Johnson, and Diane Pearl Meibos v. The Board of County Commissioners of Salt Lake County, Commissioner Randy Horiuchi and Commissioner Brent Overson : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

ALAYNA J. CULBERTSON, J. BLAINE JOHNSON, EVA C. JOHNSON, and DIANE PEARL MEIBOS,

Plaintiffs/Appellants

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SALT LAKE COUNTY, COMMISSIONER RANDY HORIUCHI and COMMISSIONER BRENT OVERSON, individually,

Defendants/Appellees

COURT OF APPEALS

Case No. 960212CA

Priority No. 14

BRIEF OF APPELLANTS

Appeal from the Order of the Third Judicial District Court
Entered April 14, 1995
The Honorable Glenn K. Iwasaki, Presiding

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IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

ALAYNA J. CULBERTSON, J. BLAINE JOHNSON, EVA C. JOHNSON, and DIANE PEARL MEIBOS, Plaintiffs/Appellants vs. THE BOARD OF COUNTY COMMISSIONERS OF SALT LAKE COUNTY, COMMISSIONER RANDY HORIUCHI and COMMISSIONER BRENT OVERSON, individually, Defendants/Appellees	COURT OF APPEALS Case No. 960212CA Priority No. 14

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Ann. §78-2a-3(2)(i) (Cum. Supp. 1994).

STATEMENT OF ISSUES

1. Issue: Did the trial court err in allowing defendants to allege that plaintiffs had not filed their Verified Complaint or their Amended Complaint within the 30-day time limitation outlined in the provisions of Utah Code Ann. §17-27-1001, although defendants had not pleaded waiver or statute of limitations in their Answer?

2. Issue: Does the trial court's failure to articulate a true basis for summary judgment require reversal?

3. Issue: Did the trial court err in apparently concluding that the decision regarding the vacation of North Union Avenue was not "rendered" until the County Commission adopted and published the "corrected" vacation ordinance No. 1275, in

August, 1994?

4. Issue: Did the trial court err in dismissing with prejudice plaintiffs' claims relating to Ordinance No. 1275, after apparently concluding that the decision regarding the vacation of North Union Avenue was not rendered until the County Commission adopted and published the "corrected" vacation ordinance No. 1275, in August, 1994?

STANDARD OF REVIEW

"Inasmuch as a challenge to summary judgment presents for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues, this court reviews those conclusions for correctness, without according deference to the trial court's legal conclusions." Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989); Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988); Daniels v. Deseret Federal Savings & Loan Assn., 771 P.2d 1100, 1101-1102 (Utah App.), cert. denied, 783 P.2d 53 (Utah 1989). "This same lack of deference applies to the trial court's interpretation of statutes, which likewise poses a question of law." Bonham, 788 P.2d at 499; accord Asay v. Watkins, 751 P.2d 1135, 1136 (Utah 1988).

This Court is to view all facts and inferences in the light most favorable to the appellants. See Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1989).

DETERMINATIVE LAW

Utah Code Ann. §17-27-808 to 810 (1994); Utah Code Ann. §17-27-1001 (1994); Utah Rules of Civil Procedure, Nos. 8, 12, 52 (1994) [Copies of these provisions of law

and rules of procedure are included in the Addendum as Exhibits A, B and C, respectively.]

STATEMENT OF THE CASE

On May 25, 1995, the Salt Lake County Commission voted to vacate or close all of North Union Avenue between 1000 East and 1300 East, the county road which was and is the sole access to plaintiffs' property and the two homes on that property. R. 476-480, 516. [A map showing the configuration of the streets and property at issue in the instant case is attached hereto as Exhibit D of the Addendum.] This action was taken at the request of Hermes Associates, a development company which was building a shopping center/redevelopment project in the area. R. 489-491. Shortly thereafter, defendants closed this road to public travel. R. 517. [The factual and legal history of this project is more fully set forth in Johnson v. Redevelopment Agency of Salt Lake County, 913 P.2d 723, 727 (Utah 1995), a copy of which is included in the Addendum of this brief as Exhibit E.]

On June 20, 1994, plaintiffs filed suit under Utah Code Ann. §17-27-808 to 810 (1994) and Utah Code Ann. §17-27-1001 (1994), alleging that the vacation of their public right-of way was illegal, and seeking injunctive relief from the court. R. 1-22, 29-34. On July 7, 1994, the Court heard plaintiffs' motion for injunctive relief and denied the same. R. 748A, et. seq. At that hearing, defendants did not allege that plaintiffs' complaint was not filed timely, nor did they allege that the decision to vacate/close North Union Avenue had not yet been rendered. Instead, they argued that the decision had been made legally,

and offered as evidence a draft of the unsigned vacation ordinance [R. 68-69], photographs of the closed road [R. 796-798], and testimony that the road vacation would not affect access to plaintiffs' property.[R. 798-799]

Beginning in June, 1994, defendants allowed Hermes to tear out North Union Avenue east of plaintiffs' property. R. 517. On July 13, 1994, more than seven weeks after the public hearing, defendants adopted and signed Ordinance No. 1270, the road vacation ordinance. R. 481-485. This ordinance differed substantively from the decision voted upon at the the May 25th hearing. Although plaintiffs had already filed a "petition of review" (verified complaint) regarding the road vacation, defendants did not notify either plaintiffs or the court of this hearing or the adoption and publication of this ordinance.[1] R. 581.

On or about July 14, 1994, plaintiffs filed an Amended Complaint challenging the legality of the road vacation. R. 89-112. On July 27, 1994, defendants filed their Answer to this Amended Complaint. R. 113-120. In this Answer, defendants did not allege that the decision to vacate North Union Avenue had not yet been rendered, they did not challenge the timing or manner of plaintiffs' complaint, nor did they plead as an affirmative defense either statute of limitations or waiver.

On August 10, 1994, without notice to plaintiffs [R. 581] or the court,[2] defendants held a hearing and adopted another vacation ordinance, Ordinance No. 1275, called the "corrected" vacation ordinance. This ordinance made technical corrections in some of the legal descriptions used in Ordinance No. 1270. R. 481-485.

In January 30, 1995, the Court held a hearing to decide, *inter alia*, whether plaintiffs could file a Second Amended Complaint to include allegations regarding the County's refusal to enforce their roadway standards, zoning standards, the the express terms of Hermes' conditional use permit. Plaintiffs also asked for damages. R. 818, et. seq. During this hearing, defendants for the first time questioned the timeliness of plaintiffs' challenge to the road vacation, claiming that plaintiffs should have filed their complaint within 30 days after the adoption in August of the "corrected" vacation ordinance, No. 1275. R. 836-838. The Court discussed this issue briefly, and then ruled that plaintiffs could file their Second Amended Complaint as submitted. R. 294-295, 843-844.

On or about February 27, 1995, defendants filed a Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment. R. 326-328. On March 29, 1995, the court held a hearing on both defendants' and plaintiffs' motions. R. 859, et. seq. Judge Iwasaki, ruling from the bench [R. 846-853], dismissed plaintiffs' complaint without prejudice, except as to "the vacation ordinance," which Judge Iwasaki said was subject to his "previous order." R. 851. [The Minute Entry for 3/29/95 states that the entire matter was dismissed without prejudice. R. 637] (A copy of the Bench Ruling is attached to the Addendum as Exhibit F.)

On April 6, 1995, defendants submitted a proposed order relating to the March 29th hearing. This order dismissed with prejudice "plaintiffs' claims as contained within plaintiffs' second amended complaint, relating to ... ordinance number 1275 (corrected),"

and dismissed without prejudice all of plaintiffs' "other claims as asserted in plaintiffs' second amended complaint..." Plaintiffs filed an Objection to this order and requested a hearing on that Objection. R. 639-641, 642-643.

On April 14, 1995, without ruling on plaintiffs' objection and without notifying plaintiffs, the Court signed defendants' order. R. 647-649. [A copy of this Order is included in the Addendum an Exhibit G.] The Court issued no ruling or Conclusions of Law explaining the reason for dismissing with prejudice some of plaintiffs' claims, nor did the Court identify with any specificity which claims were "relating to ... ordinance number 1275 (corrected)." On May 18, 1995, by way of Minute Entry, the court denied plaintiffs' Request for Hearing and Objection and instructed defendants' counsel to prepare the order. R. 652-652. On September 26, 1995, the court signed the order denying plaintiffs' Objection and Request for Hearing. R. 701-701.

STATEMENT OF FACTS

1. Plaintiffs are owners of eight parcels of property and two homes located in Union, unincorporated Salt Lake County, first platted in 1857. R. 1, 418. Since that time, the sole access to this property and those homes has been North Union Avenue, a county road. R. 516. That road was 33 feet wide, had been a platted road for more than 100 years, and provided plaintiffs with access to 900 East and 1300 East. R. 2. The addresses for the two homes are 1072 East North Union Avenue and 1078 East North Union Avenue. R. 418, 516.

2. In 1991, Hermes proposed to the Salt Lake County Commission that they

expand The Family Center as a redevelopment project, complete with public funding and the use of eminent domain. Eventually, Hermes included plaintiffs' property and North Union Avenue within the proposed boundaries of their shopping center expansion. R. 467.

3. In February, 1994, the Commission, by a vote of 2-to-1, adopted a contract with Hermes regarding the dispersal of lands and funding under the aegis of the redevelopment law. In that contract, the County Commission, sitting as the Redevelopment Agency Board of Directors, contracted to seek the vacation of the public rights-of way located within the redevelopment project area, including North Union Avenue where it accessed plaintiffs' property. The contract also included a provision requiring Hermes to defend in court all actions taken by the county which might result in the loss of access and inverse condemnation of plaintiffs' property. R. 785.

4. On February 15, 1994, Hermes filed a Petition for Street Vacation, seeking the vacation of, *inter alia*, North Union Avenue as it accessed plaintiffs' property. R. 489.

5. In April, 1994, the Salt Lake County Planning Commission approved a conditional use permit for Hermes shopping center. R. 467.

6. On May 25, 1994, defendants voted to vacate North Union Avenue between 1000 East and 1300 East, except for except a 25-foot wide portion of the road directly in front (north) of plaintiffs' property. That 25' x 250' strip was "closed." This portion of the road was closed rather than (totally) vacated so that title to the half of the road property would not accrue to plaintiffs. R. 4-5, 476-480. [A copy of the minutes for this hearing are included in the Addendum as Exhibit H.]

7. This motion as passed included the vacation of eight feet of the public right-

of-way in front of plaintiffs' property. However, instead of that eight feet of road accruing half to each abutting landowner, defendants specified that all eight feet would be vacated from the north side of North Union Avenue and would accrue only to Hermes. This deprived plaintiffs of approximately 1000 square feet of property. R. 6, 476-480.

8. This vote by the defendants created a 25 foot x 250 foot closed public roadway that had no outlet to any other roadway. R. 5, 476-480.

9. Plaintiffs did not receive the required notice regarding the action taken at the May 25th hearing, nor did they receive any type of notification regarding any of the actions subsequently taken by the Commissioners which directly affected their property. R. 581.

10. On or about June 20, 1994, plaintiffs filed with the trial court a complaint which, *inter alia*, alleged that the vacation ordinance adopted by the Commission was illegal as to the actions taken regarding plaintiffs' property and the easement and access thereto. R. 1-22. The complaint also asked the court to review the question of access to plaintiffs' property, and further asked the court to enjoin defendants from vacating the road until the question of reasonable ingress and egress could be decided. After plaintiffs filed this complaint, defendants did not inform either plaintiffs or the court that they had not yet signed an ordinance and did not allege that plaintiffs' complaint (petition for review) was not filed timely or properly. In fact, defendants argued that the vacation ordinance was legal, and included a copy of the unsigned ordinance as evidence. R. 68-69.

11. On or about June 24, 1994, defendants, by way of letter, tendered defense

of this lawsuit and of the County's actions to Hermes Associates. Subsequently, Hermes' attorney, Nick Colessides, who had represented Hermes throughout the redevelopment and planning and zoning processes, made an appearance as counsel for the County and the individual Commissioners. R. 785.

12. Starting in June, 1994, defendants allowed Hermes and their representatives to block off and tear out North Union Avenue east of plaintiffs' property. R. 517.

13. On or about July 7, 1994, the court heard plaintiffs' motion for an injunction and denied the same. R. 748A, et. seq. The court stated that this denial was based solely on plaintiffs' failure to show evidence of irreparable harm, and that the ruling was not a reflection on the merits of the complaint. R. 750. At that hearing, defendants did not allege that plaintiffs' complaint was not filed timely, nor did they allege that the decision to vacate/close North Union Avenue had not yet been rendered. Instead, they argued that the decision had been made legally, and offered as evidence a draft of the unsigned vacation ordinance [R. 68-69], photographs of the closed road [R. 796-798], and testimony that the road vacation would not adversely affect access to plaintiffs' property. R. 798-799.

14. On July 13, 1994, more than seven weeks after voting on the vacation/closure, defendants held a hearing and voted to sign and publish Ordinance No. 1270, vacating or closing North Union Avenue. R. 481-485. This ordinance was substantively different from the action voted on by the Commission on May 25th in that it established a 25-foot public right-of-way to the "south" [west] of plaintiffs' property, rather than a private shared easement as had been voted on at the May 25 hearing.

Although plaintiffs had already filed a "petition of review" (verified complaint) regarding the road vacation, defendants did not notify either plaintiffs[1] or the court of this hearing or the adoption and publication of this ordinance. R. 581.

15. On or about July 14, 1994, plaintiffs filed an amended complaint that continued allege the illegality of the road vacation decision as it involved plaintiffs' easement and property, and asked the court to review the question of access to plaintiffs' property. R. 89-112.

16. On July 27, 1994, defendants filed their Answer to this amended complaint. R. 113-120. In this Answer, defendants did not allege that the decision to vacate North Union Avenue had not yet been rendered, they did not challenge the timing or manner of plaintiffs' complaint, nor did they plead as an affirmative defense either statute of limitations or waiver.

17. During the last week of July, 1994, defendants took depositions from all four plaintiffs and did not assail the timing or manner of plaintiffs' petition for review. This is the first time plaintiffs were informed that the adopted vacation ordinance, Ordinance No. 1270, was substantively different from the decision voted upon at the May 25, 1994 hearing. R. 552.

18. On or about August 10, 1994, the Commission held another hearing regarding the vacation of North Union Avenue. The Commission adopted and signed what defendants call the "corrected Vacation Ordinance," No. 1275. R. 486-492. This ordinance did not differ substantively in its effect on plaintiffs' access from Ordinance No. 1270, which defendants published in July and which plaintiffs appealed. Rather, this

ordinance made technical corrections in some of the legal descriptions used in Ordinance No. 1270. Plaintiffs were not notified that the County was holding another hearing on the vacation of their road. Although plaintiffs had filed timely an amended complaint with the trial court, and defendants had answered, neither the plaintiffs[2] nor the court were notified that defendants had signed a "corrected Vacation Ordinance." R. 552.

19. In August and September, 1994, defendants and Hermes blocked off and tore out North Union Avenue west of plaintiffs' property, between 1000 East and the northwest corner of plaintiffs' property. R. 518 They replaced North Union Avenue with a road that did not meet the minimum standards outlined in the County's Standards for Roadway Development. R. 463-466. This road was dedicated to the County and was eventually designated as 1070 East. Since that time, fire trucks, garbage trucks, snow plows and other large vehicles can't access plaintiffs' homes or property. R. 512, 518-523.

20. In October, 1994, Hermes built one of their retail buildings into the 25-foot public right-of-way established by Ordinance Nos. 1270 and 1275. Plaintiffs, through counsel, notified the County of this breach. R. 473-474. The County responded only that there was a problem but refused to enforce the public right-of-way and their roadway standards. R. 475.

21. On December 19, 1994, plaintiffs, through counsel, served defendants with a notice of claim regarding damages to plaintiffs caused by defendants' continuing refusal to enforce the public right-of-way as outlined in Ordinance No. 1275 (and No. 1270). R. 493-495.

22. On January 30, 1995, the court held a hearing on plaintiffs' motion for leave to amend their complaint to include allegations regarding the County's refusal to enforce their roadway and zoning standards and the express terms of Hermes' conditional use permit. R. 818, et seq. During that hearing, defendants told the court that plaintiffs could not continue to assail "the validity of the vacation ordinance" because plaintiffs had not re-filed their amended complaint 30 days after the county signed the "Corrected Vacation Ordinance" in August, 1994. Defendants argued that the decision to vacate North Union Avenue was not "rendered" until defendants signed the "corrected" vacation ordinance. R. 836-838. Notwithstanding, Judge Iwasaki ruled that plaintiffs could file the second amended complaint as they had submitted to the court, and signed an order effecting that ruling. R. 294-295, 843-844.

23. On February 3, 1995, plaintiffs filed notices of claim with the County regarding damages to plaintiffs caused by defendants' continuing refusal to enforce their roadway and zoning standards, and the conditional use permit which the County had issued to Hermes. R. 493-503.

24. On February 13, 1995, plaintiffs filed their second amended complaint which continued to allege the illegality of the road vacation as regarded plaintiffs' property, easement and access, and continued to ask the court to review the question of access. Plaintiffs added claims regarding defendants' failure to enforce their ordinances and permits, and, for the first time, notified the court of plaintiffs' intention to seek both compensatory and punitive damages. R. 296-311.

25. On or about February 23, 1995, defendants filed an answer to plaintiffs'

second amended complaint. R. 312-323.

26. On or about February 27, 1995, defendants filed a Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment. In this pleading, defendants argued that plaintiffs could not continue to challenge the legality of the road vacation because they had "promised" the Court they "would not challenge the validity of the Vacation Ordinance as passed and adopted by the Board." Defendants also argued that plaintiffs couldn't claim damages for the actions taken by the County. R. 329-345.

27. On March 1, 1995, plaintiffs filed a motion for a preliminary injunction, asking the court to order the County Commissioners to enforce their roadway and zoning standards and the conditional use permit granted to Hermes. Plaintiffs also asked the court to issue an injunction against any building adjacent to plaintiffs' property until the question of reasonable access could be reviewed by the court. R. 377-416.

28. On March 29, 1995, the court held a hearing on both defendants' and plaintiffs' motions. R. 859, et. seq. At that hearing, defendants told the Court that during the hearing on the motion to amend, Judge Iwasaki had made plaintiffs promise not to challenge the "validity" of the "Corrected" Vacation Ordinance No. 1275, and asked the court to dismiss the remainder of plaintiffs' Second Amended Complaint for failure to exhaust administrative remedies. Judge Iwasaki, ruling from the bench [R. 846-853], dismissed plaintiffs' complaint without prejudice, except as to "the vacation ordinance," which Judge Iwasaki said was subject to his "previous order." R. 851. (The Minute Entry for 3/29/95 states that the entire matter was dismissed without prejudice. R. 637)

29. On April 6, 1995, defendants submitted a proposed order relating to the

March 29th hearing. This order dismissed with prejudice "plaintiffs' claims as contained within plaintiffs' second amended complaint, relating to ... ordinance number 1275 (corrected)," and dismissed without prejudice all of plaintiffs' "other claims as asserted in plaintiffs' second amended complaint..." R. 647-649. The Court submitted neither a ruling nor Conclusions of Law explaining the basis for dismissing certain of plaintiffs' claims with prejudice. Plaintiffs filed an Objection to this order and requested a hearing on that Objection. R. 639-641, 642-643.

30. On April 14, 1995, without ruling on plaintiffs' objection and without notifying plaintiffs, the Court signed and entered defendants' order. R. 647-649.

31. On May 18, 1995, by way of Minute Entry, the court denied plaintiffs' Request for Hearing and Objection and instructed defendants' counsel to prepare the order. R. 652-653.

32. On September 26, 1995, the Court signed the order denying plaintiffs' Objection and Request for Hearing. R. 701-702.

SUMMARY OF ARGUMENTS

POINT I

By not pleading statute of limitations or waiver as an affirmative defense in their Answer, defendants waived the right to challenge the timeliness of plaintiffs' complaints regarding the vacation of North Union Avenue. Utah's Rules of Civil Procedure require that motions resulting in the dismissal of a complaint must be made by written motion with written notice. The trial court erred in allowing the defendants to raise the

timeliness defense outside the pleadings and in an untimely fashion.

POINT II

While the failure of the trial court to articulate the basis for granting summary judgment is a violation of the Utah Rules of Civil Procedure, and may have resulted in a denial of plaintiffs' Constitutional rights to due process and access to the courts, it may not be necessary for the appeals court to correct this error by remanding the case to the trial court to enter a ruling or conclusions of law. Because the issues involved in this appeal represent questions of law only, the Court of Appeals may proceed to issue opinions without further discussion from the trial court.

POINT III

If the Court of Appeals finds, contrary to the apparent conclusion of the trial court, as a matter of law, that the decision to vacate North Union Avenue was "rendered" either during the May 25, 1994 public hearing, or that the decision was rendered shortly thereafter when defendants blocked off the road to public use and allowed Hermes to tear out and alter the road, then plaintiffs filed their petition for review of the decision in a timely manner, as outlined in Utah Code Ann. §17-27-1001(1994). Under this finding, the Court of Appeals should remand this case to the trial court to allow plaintiffs to discover and present evidence and legal argument challenging the legality of the road vacation decision.

POINT IV

If the Court of Appeals finds agrees with the trial court's apparent conclusion that, as a matter of law, the decision to vacate North Union Avenue was not made until the

County Commission adopted and published one or other of the road vacation ordinances, then the decision and the ordinances are invalid as a matter of law because of the failure of the defendants to follow the procedure for the vacation of a platted road, as outlined in Utah Code Ann. §17-27-808, et. seq.

Under this finding, defendants illegally turned over the public right-of-way to Hermes for destruction prior to the adoption of either of the vacation ordinances and without having legally vacated that right-of-way, an action which nullifies the decision. Further, defendants, *inter alia*, adopted and published both Ordinance No. 1270 and No. 1275 long after the 30 days allowed by Utah Code Ann. §17-27-810(1)(a). Defendants also failed to provide plaintiffs with any written notice of the vacation of this road, an action which has already been ruled, by the Utah Court of Appeals, to invalidate the vacation ordinance. [See Nelson v. Provo City, 872 P.2d 35 (Utah App. 1994), a copy of which is included in the Addendum as Exhibit J.]

If the Court of Appeals makes the determination that the vacation of North Union Avenue, or any other road, does not take place until the adoption and publication of the vacation ordinance, and until abutting landowners have received written notification of the road vacation, then the Court of Appeals should conclude that the County Commission did not properly vacate North Union Avenue, and should, as they did in Nelson, remand this case for further proceedings consistent with that opinion.

ARGUMENT

POINT I

IN NOT PLEADING STATUTE OF LIMITATIONS OR WAIVER AS AN

AFFIRMATIVE DEFENSE IN THEIR ANSWER TO PLAINTIFFS' COMPLAINT, DEFENDANTS WAIVED THE RIGHT TO CHALLENGE THE TIMELINESS OF PLAINTIFFS' PETITION FOR REVIEW [COMPLAINT] REGARDING THE COMMISSION'S DECISION TO VACATE NORTH UNION AVENUE.

While the basis for the trial court's ruling dismissing claims relating to Ordinance No. 1275 is not clear from the record (because the trial court indicated that the dismissal was premised on a prior order which the court never actually made), the defendants argued orally to the trial court that the basis for dismissing the claims was that plaintiffs were not timely in filing their complaint because the plaintiffs did not file a new complaint after the defendants adopted and published Ordinance No. 1275, which made technical corrections to the prior ordinance reflecting the defendants' prior decision to vacate the road. This argument was not raised in defendants' answer to plaintiffs' complaints.

Utah Rule of Civil Procedure 8 governs general rules of pleadings in civil cases.[3] In subsection (c), the rule provides that affirmative defenses, including the defenses of waiver and statute of limitations, must be asserted in responsive pleadings. It states,

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

Utah Rule of Civil Procedure 12 similarly requires that defenses such as waiver and statute of limitations must be raised in responsive pleadings, or in some cases in

motions filed prior to responsive pleadings.[4] Subsection (b) of rule 12 provides, in relevant part,

> ... Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Subsection (h) of rule 12 reiterates that defenses such as waiver and statutes of limitations are waived if not timely raised in responsive pleadings. That subsection states,

> (h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

Utah case law has consistently held that defenses such as waiver and statute of limitations are waived if not timely raised in responsive pleadings, and demonstrate the trial court's error in allowing the defendants to raise this defense after filing answers to plaintiffs amended complaints without raising such a defense. See American Coal Co. v. Sandstrom, 689 P.2d 1, 4 and n.7 (Utah 1984)("Statutes of limitation are not jurisdictional and can be waived.")(footnote citing Utah Rule of Civil Procedure 8(c) omitted); Staker

v. Huntington Cleveland Irr. Co., 664 P.2d 1188, 1190 (Utah 1983)("The statute of limitations defense must be pleaded as an affirmative defense in a responsive pleading, or it is waived, Utah R.Ci.P. 8(c) and 12(h), unless an amended pleading asserting the defense is allowed pursuant to the requirements of Rule 15(a)."); Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898, 901 and nn. 4 and 5 (Utah 1976)("[T]he matter of waiver is ordinarily an affirmative defense which should be pleaded, or the waiver itself is deemed to be waived.")(footnotes citing rules 8(c) and 12(h) omitted).

In the instant case, plaintiffs filed a Verified Complaint and an Amended Complaint challenging the legality of the decision to vacate plaintiffs' road. Both plaintiffs and defendants conducted discovery and filed various motions. In the middle of a hearing to amend their complaint to include actions taken by the County Commission subsequent to the decision to vacate the road, defendants, without making a written motion and without providing notice to either plaintiffs or the court, suddenly argued that the decision to vacate the road had not filed their complaint in a timely fashion. Plaintiffs were given no opportunity to prepare for or to properly brief the court on this issue.

Given that the defendants' claim of waiver or statute of limitations was not properly pled in their responsive pleadings, the trial court erred in allowing the defendants to raise the defense outside the pleadings and in an untimely fashion.

POINT II

THE TRIAL COURT'S FAILURE TO ARTICULATE THE BASIS FOR GRANTING SUMMARY JUDGMENT DOES NOT REQUIRE REMAND BECAUSE THE APPEALS COURT MAY REVERSE THE DISMISSAL

WITHOUT FURTHER DISCUSSION BY THE TRIAL COURT.

The trial court signed and entered an order prepared by counsel for defendants which dismissed with prejudice all claims relating to Ordinance No. 1275, despite the fact that the trial court had never previously ordered those claims dismissed with or without prejudice. The only apparent basis for dismissing these claims was a purported "previous order" which never existed. [The only Orders filed in the instant case prior to the Order of dismissal was the Order allowing plaintiffs to file a Second Amended Complaint.] At the hearing on the plaintiffs' motion for leave to amend the complaint, defendants argued something to the effect that the decision to vacate North Union Avenue was not rendered until defendants adopted the "corrected" road vacation ordinance, Ordinance No. 1275, more than twelve weeks after the hearing on the road vacation. Defendants suggested to the court that plaintiffs should be prohibited from pursuing defects in Ordinance No. 1275, because plaintiffs had failed to file a separate appeal after that ordinance was enacted. The trial court discussed this argument, but deferred ruling on it. The trial court ruled only that plaintiffs would be allowed to file their Second Amended Complaint as submitted, including their continuing claims that the decision to and manner in which North Union Avenue was vacated was illegal. The court then signed an order effecting that ruling.

At a subsequent hearing, the trial court ordered plaintiffs' Second Amended Complaint dismissed without prejudice, requiring them to exhaust their administrative remedies, but excepted claims regarding Ordinance No. 1275 from this ruling, indicating that the court had already ruled on those claims. Counsel for defendants drafted an order indicating that claims relating to Ordinance No. 1275 were dismissed with prejudice, and

the trial court signed this order over the objection of the defendants.

The trial court's order dismissing the claims pertaining to Ordinance No. 1275 violated the plaintiffs' rights to due process of law, because the plaintiffs had no notice that the trial court would or did decide the issue, and no full and fair opportunity to be heard prior to the making of the purported decision. See e.g. Christiansen v. Harris, 163 P.2d 314 (Utah 1945)(discussing general contours of due process, especially under the state constitution).

The trial court also violated Utah Rule of Civil Procedure 52, which requires trial courts to enter written decisions in resolving motions for summary judgment.[5] Subsection (a) of that rule provides in relevant part, "The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground."

While the trial court's order granting summary judgment indicates that dismissal of the claims relating to Ordinance No. 1275 is based on the prior order of the court, the court entered no prior order dismissing the claims.[6]

The trial court's failure to clearly articulate the basis for dismissing the claims, while a violation of rule 52, does not require reversal on this basis because this Court can assess the illegality of the dismissal of the claims on appeal without further discussion by the trial court.[7] Review of issues 1, 2 and 3 demonstrates that there was no proper basis for dismissal of the claims. However, it is noteworthy that the trial court's failure to ever clearly explain a basis for dismissal of the claims strips the trial court's ruling of the presumption of correctness normally afforded to rulings of the trial courts.[8]

POINT III

IF THE APPEALS COURT DETERMINES THAT, AS A MATTER OF LAW, THE COMMISSION MADE THE DECISION TO VACATE NORTH UNION AVENUE AT THE MAY 25, 1994 HEARING, AND THAT THE DECISION WAS "RENDERED" IMMEDIATELY THEREAFTER WHEN DEFENDANTS BLOCKED OFF THAT ROAD AND ALLOWED HERMES TO TEAR UP AND/OR ALTER THAT ROAD, THEN PLAINTIFFS FILED THEIR PETITION FOR REVIEW OF THAT DECISION IN A TIMELY MANNER.

The trial court apparently adopted the argument of the defendants that plaintiffs' claims regarding Ordinance No. 1275 were subject to dismissal with prejudice because the plaintiffs did not file a new complaint appealing from Ordinance No. 1275 within 30 days of the enactment of this ordinance. The trial court apparently adopted the defendants' arguments that the decision to vacate the road was not "rendered" and appealable until Ordinance No. 1275 was enacted.

Utah Code Ann. §17-27-810 governs the actions of the defendants at issue here, the vacation of roads. It provides,

> (1) (a) Within 30 days after the public hearing required by this part, the responsible body or officer shall consider the petition.
>
> (b) If the responsible body or officer is satisfied that neither the public nor any person will be materially injured by the proposed vacation, alteration, or amendment, and that there is good cause for the vacation, alteration, or amendment, the legislative body, by ordinance, may vacate, alter, or amend the plat, any portion of the plat, or any street or lot.
>
> (c) The responsible body or officer may approve the vacation, alteration, or amendment by ordinance, amended plat, administrative order, or deed containing a stamp or mark indicating approval by the responsible body or officer.
>
> (d) The responsible body or officer shall ensure that the vacation, alteration, or amendment is recorded in the office of the county

recorder in which the land is located.

(2) An aggrieved party may appeal the responsible body's or officer's decision to district court as provided in Section 17-27-1001.

It is critical to note that the statute governing vacation of roads allows for the appeal of the *decision* on the petition for vacation, rather than of the adoption of the *ordinances*. Utah Code Ann. §17-27-810(2), *supra.*

The statute governing land use appeals, Utah Code Ann. §17-27-1001(1994), similarly provides for appeals of decisions rendered, rather than ordinances enacted. It states,

> (1) No person may challenge in district court a county's land use decisions made under this chapter or under the regulation made under authority of this chapter until they have exhausted their administrative remedies.
>
> (2) Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.
>
> (3) The courts shall:
> (a) presume that land use decisions and regulations are valid; and
> (b) determine only whether or not the decision is arbitrary, capricious, or illegal.

The trial court apparently accepted the defendants' argument that the decision to vacate the road was not "rendered" until the successive Ordinance No. 1275 was formally enacted.

In so interpreting the governing statutes, the trial court contravened fundamental rules of statutory construction requiring courts to follow the plain meaning of legislation, and to give normal meaning to each word enacted by the legislature.[9] These rules of statutory construction are essential to the constitutional doctrine of separation of government powers,[10] because they insure that courts apply the laws enacted by the

legislatures, rather than legislating from the bench.[11]

The decision rendered in the instant matter and subject to the appeal filed in the trial court was the decision to vacate the road, which was made and actually carried out, long before Ordinance No. 1275 was enacted.

The governing statutes allow for the appeals of decisions, and do not require that the commissioners' decisions be enacted into formal ordinances to be appealable. While the statute governing the vacation of roads specifically discusses the enactment of ordinances in the road vacation process, in discussing appeals, the statute speaks in terms of appeals of decisions, not of ordinances. Utah Code Ann. §17-27-810. The statute governing such appeals, Utah Code Ann. §17-27-1001, similarly speaks in terms of appeals from decisions rendered, not decisions enacted into ordinances. Common usage of the term "rendered" does not encompass the notion of enactment into formal legislation.[12] Had the legislature intended for appeals from the activities of the commissioners to be limited to decisions formalized in ordinances, the legislature could and would have specified that appeals lie from ordinances, rather than decisions. See Johnson v. Redevelopment Agency of Salt Lake County, 913 P.2d 723, 727 (Utah 1995).[9]

In apparently concluding that the decision to vacate the road was not "rendered" when it was voted upon at the May 25, 1994 hearing nor was it "rendered" when the road was altered and/or destroyed, but was as a matter of law "rendered" when the most recent ordinance was enacted, the trial court diverged from the plain meaning of the plain language of the statutes governing the appeal.

By allowing the defendants to evade appeal of the road vacation decision via the

enactment of a successive ordinance, the trial court effectively denied the plaintiffs their rights to appeal and to access to the courts.[13] As this case demonstrates, condoning the defendants' argument and trial court's ruling would allow defendants to continually evade appeal by simply enacting successive amended ordinances, even if such ordinances were substantively identical to decisions already appealed from. Such gamesmanship would portend litigation that would end only at the exhaustion of the resources of plaintiffs, and would be fundamentally inconsistent with the plaintiffs' rights to due process of law and access to the courts.

Obviously, the decision to vacate North Union Avenue was effectively rendered at the time the actions seemingly allowed by the road vacation (the alteration, replacement and destruction of North Union Avenue) commenced or were put into effect. This process was initiated in early June, shortly after the public hearing, and continued without regard for the adoption, signing and publication of the two road vacation ordinances. Plaintiffs filed their complaint within 30 days of the "rendering" of this decision, at the May 25th hearing or when destruction of the road began, and in so doing, fulfilled the requirements of Utah Code Ann. §17-27-1001.

POINT IV

IF THE APPEALS COURT DETERMINES THAT AS A MATTER OF LAW, THE DECISION TO VACATE NORTH UNION AVENUE WAS NOT "RENDERED" UNTIL THE SIGNING OF A VACATION ORDINANCE, THEN THE COURT ERRED IN DISMISSING WITH PREJUDICE CLAIMS REGARDING THE VACATION ORDINANCE.

If the trial court concluded that the decision to vacate North Union Avenue was not legally enacted until the defendants had adopted and published Ordinance No. 1275, then the trial court erred in dismissing plaintiffs' claims as to the validity of the road ordinance. Upon making that determination, the trial court should have concluded that the County Commission did not properly vacate the road and that both of the vacation ordinances were invalid and illegal.

A. ORDINANCES NO. 1270 AND NO. 1275 ARE BOTH INVALID BECAUSE OF THE FAILURE OF THE COUNTY TO STRICTLY FOLLOW THE ENABLING LEGISLATION.

As is required in the adoption of all ordinances, when adopting an ordinance to vacate a public, platted road (particularly one which is still in use), strict adherence to the enabling legislation is required. For instance, in the redevelopment case associated with the instant case, Johnson v. Redevelopment Agency of Salt Lake County, 913 P.2d 723 (Utah 1995), the Supreme Court again affirmed the principal of strict adherence.

> Because area redevelopment is serious action that may be in derogation of individual property rights, strict compliance with enabling legislation is required to enact ordinance setting up redevelopment plan.

Id. at 723 (citation omitted)

Certainly, the vacation of the public right-of-way which is and has always been the sole access to plaintiffs' property is an action that may be in derogation of plaintiffs' individual property rights and is as as serious an action as area redevelopment. Consequently, the government agency taking that action is required to strictly comply with the enabling legislation.

Utah Code Ann. §17-27-810 governs the actions of the defendants at issue here, the vacation of roads. It provides,

> (1) (a) Within 30 days after the public hearing required by this part, the responsible body or officer shall consider the petition.
>
> (b) If the responsible body or officer is satisfied that neither the public nor any person will be materially injured by the proposed vacation, alteration, or amendment, and that there is good cause for the vacation, alteration, or amendment, the legislative body, by ordinance, may vacate, alter, or amend the plat, any portion of the plat, or any street or lot.
>
> (c) The responsible body or officer may approve the vacation, alteration, or amendment by ordinance, amended plat, administrative order, or deed containing a stamp or mark indicating approval by the responsible body or officer.
>
> (d) The responsible body or officer shall ensure that the vacation, alteration, or amendment is recorded in the office of the county recorder in which the land is located.
>
> (2) An aggrieved party may appeal the responsible body's or officer's decision to district court as provided in Section 17-27-1001.

The "public hearing required by this part" was, presumably, the hearing held on May 25, 1994, as that was the only hearing for which plaintiffs received notice. Both vacation Ordinances No. 1270 (adopted on July 13, 1994) and No. 1275 (adopted on August 10, 1994) were adopted more than 30 days after the public hearing. This was in violation of Utah Code Ann. §17-27-810(1)(a), which requires that the vacation be approved *within 30 days* after the public hearing. It is defendants, not plaintiffs, who have failed to timely meet their 30-day statute-of-limitations. The result of having failed to strictly comply with the enabling legislation is that the vacation ordinances, both 1270 and 1275, are invalid *ab initio*. Again, in Johnson, the Supreme Court concluded that, because the RDA failed to comply with one of the provisions of The Utah Neighborhood Development Act (1993), the "ordinance in question is invalid." Id. at 731.

B. BECAUSE PLAINTIFFS RECEIVED NO NOTICE OF THE ADOPTION AND SIGNING OF THE VACATION ORDINANCE, AND BECAUSE DEFENDANTS ILLEGALLY BLOCKED OFF AND ALLOWED HERMES TO TEAR OUT AND/OR ALTER NORTH UNION AVENUE PRIOR TO THE SIGNING OF EITHER ORDINANCE, THE PURPORTED VACATION OF THE ROAD IS A NULLITY.

It is an undisputed fact that the County closed North Union Avenue and that defendants allowed Hermes to begin the process of tearing out that road, at least two months before the adoption of Ordinance No. 1275. Defendants' argument that the decision to vacate the road was not properly rendered until the adoption of that ordinance is a candid admission on their part that the Commissioners intentionally allowed the destruction of the public right-of-way long before they had vacated the road.

The Utah Court of Appeals has recently ruled on a case involving the vacation of a public road, and the facts of that case are strikingly similar to the instant case. In Nelson v. Provo City, 872 P.2d 35 (Utah App. 1994), this Court invalidated the road vacation because of untimely and insufficient notice.

> Roadway was not properly vacated, where city failed to notify abutting landowners, or to notify its citizens generally pursuant to statute until after purported vacation.

Id. at 35, citation omitted.

In the instant case, plaintiffs were notified of a public hearing on this issue, but were never notified of any of the subsequent actions taken regarding the vacation of their road. The Ordinances which were ultimately adopted to enact the road vacation differed in substance and effect from what was discussed at the public hearing. Defendants (in an

untimely fashion) adopted two different road vacation ordinances, but provided no notice whatsoever of the underlying hearings or of the decisions made during those hearing regarding the vacation of the road. Additionally, the adoption of these ordinances occurred after the fact, when much of North Union Avenue was nothing but a memory. "Thus, City's notice was not only insufficient, it was untimely. As a result, any purported vacation of the Roadway is a nullity." Nelson at 38. This Court's decision in the Nelson case, "to reverse the court's conclusion that City properly vacated the Roadway and remand for further proceedings consistent with this opinion," is also appropriate in this action. [Again, because the trial court did not articulate the basis for granting defendants' summary judgment motion, and because this represents an issue of law, not fact, the Court of Appeals is not restricted from rendering an opinion on the process leading to the adoption of the vacation ordinances. See footnote 8, below.]

C. THE TRIAL COURT SHOULD NOT HAVE DISMISSED PLAINTIFFS' COMPLAINT AFTER RECEIVING DEFENDANTS' ADMISSIONS THAT THEY ILLEGALLY VACATED NORTH UNION AVENUE. IN SO DOING, THE TRIAL COURT IMPROPERLY TRANSFERRED THE RESPONSIBILITY FOR PROCEDURE AND NOTICE FROM THE "RESPONSIBLE BODY" TO THE PLAINTIFFS.

Again, Utah Code Ann. §17-27-808, et. seq. governs the actions of the defendants in the vacation of roads. Section -810 provides,

> (1) (a) Within 30 days after the public hearing required by this part, the responsible body or officer shall consider the petition.
>
> (b) If the responsible body or officer is satisfied that neither the public nor any person will be materially injured by the proposed vacation, alteration, or amendment, and that there is good cause for the

> vacation, alteration, or amendment, the legislative body, by ordinance, may vacate, alter, or amend the plat, any portion of the plat, or any street or lot.
>
> (c) The responsible body or officer may approve the vacation, alteration, or amendment by ordinance, amended plat, administrative order, or deed containing a stamp or mark indicating approval by the responsible body or officer.
>
> (d) The responsible body or officer shall ensure that the vacation, alteration, or amendment is recorded in the office of the county recorder in which the land is located.
>
> (2) An aggrieved party may appeal the responsible body's or officer's decision to district court as provided in Section 17-27-1001.

The County Commission is the "responsible body" referenced in this statute. They, the defendants in this action, are responsible for following the procedure outlined in the enabling ordinance, making the vacation decision, holding public hearings, providing adequate and timely notice, adopting and recording the vacation ordinance, and so forth. It is clear from the plain language of the legislation that the burden of responsibility for the actions taken to vacate a public road rests squarely on the shoulders of the County Commission.

However, when the Commission admitted to the trial court that the decision to vacate North Union Avenue was not made until the adoption of Ordinance No. 1275, although they had effected that road vacation months prior to the adoption of that ordinance, the Court inexplicably dismissed plaintiffs' complaint. In so doing, the trial court effectively, and incorrectly, transferred the responsibility for procedure to the plaintiffs away from the Commission.

Plaintiffs filed their complaint on the road vacation decision when defendants told plaintiffs that the decision had been made. When defendants held additional hearings on

the issue, and when they adopted the road vacation ordinances, defendants did not provide any notice to plaintiffs of those decisions. Nevertheless, defendants and then the trial court expected plaintiffs to be responsible for actions and decisions of which they had no knowledge, and for which the enabling legislation clearly anticipated the County Commission should be responsible. The trial court erred in shifting this burden of responsibility by dismissing with prejudice plaintiffs' claims regarding the road vacation ordinance.

CONCLUSION

Defendants waived the right to challenge the timeliness of plaintiffs' complaints by failing to plead timeliness as an affirmative defense. This Court, then, must make the determination of when the road vacation was properly enacted and rendered.

If this Court determines that the decision on the road vacation was properly made at the May 25, 1994 hearing, then plaintiffs respectfully request this Court to reverse the trial court's dismissal, with prejudice, of all claims relating to Ordinance No. 1275, and to remand the case for further proceedings consistent with plaintiffs' Amended Complaint or Second Amended Complaint.

If this Court makes the determination that the decision to vacate North Union Avenue was not rendered until the adoption and publication of the vacation ordinance, whether it's No. 1270 or No. 1275, then plaintiffs respectfully request this Court to reverse the trial court's dismissal, with prejudice, of all claims relating to Ordinance No. 1275, and to remand the case for further proceedings consistent with this opinion.

RESPECTFULLY SUBMITTED this 16th day of December, 1996.

Diane Pearl Meibos
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FOOTNOTES

1 This lack of notice, in and of itself, invalidates the road vacation ordinance, as per the ruling of this Court in Nelson v. Provo City, 872 P.2d 35 (Utah App. 1994), in which this Court invalidated the road vacation because of untimely and insufficient notice,

> Roadway was not properly vacated, where City failed to notify abutting landowners, or to notify its citizens generally pursuant to statute until after purported vacation.

Id. at 35, citation omitted.

2 See footnote 1, above.

3 Rule No. 8 states in full,

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

4 Rule No. 12 provides in its entirety,

(a) When Presented. A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other

defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief

can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) Pleading After Denial of a Motion. The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) Security for Costs of a Nonresident Plaintiff. When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a $300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) Effect of Failure to File Undertaking. If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.

5 Rule 52 states in full,

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial

pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the Trial Court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of Findings of Fact and Conclusions of Law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(1) by default or by failing to appear at the trial;

(2) by consent in writing, filed in the cause;

(3) by oral consent in open court, entered in the minutes.

6 In assessing the adequacy of the trial court's order granting summary judgment, this Court is not limited to the written order of the court, but may review all findings expressed in court documents and in transcripts of bench rulings. See e.g. Merriam v. Merriam, 799 P.2d 1172, 1177 (Utah App. 1990)(in child custody decision, Court indicated, "[O]n review we are not limited to written findings, and may properly examine findings expressed solely from the bench or contained in other court documents, such as court memoranda.").

7 See Masters v. Worsley, 777 P.2d 499, 500-501 (Utah App. 1989)(noting that trial court's failure to comply with Rule 52 is normally reversible error, but declining to remand where the interests of judicial economy called on the Court to simply reverse the trial court on the merits of the trial court's order granting summary judgment).

8 For instance, in Retherford v. AT & T Communications of Mountain States, Inc., 844 P.2d 949 (Utah 1992), the court criticized the trial court's ruling, stating,

> Such a blanket statement provides us with no guidance as to the trial court's reasoning. It therefore does not comply with rule 52(a) of the Utah Rules of Civil Procedure, which requires trial judges to issue brief written statements of their grounds for granting summary judgment when multiple grounds are presented. See Utah R.Civ.P. 52(a). Although failure to issue a statement of grounds is not reversible error absent unusual circumstances, we take this opportunity to remind trial judges that the presumption of correctness ordinarily afforded trial court rulings "has little operative effect when members of this court cannot divine the trial court's reasoning because of the cryptic nature of its ruling."

Id. at 979 n.4 (citation omitted).

9 For instance, in Johnson v. Redevelopment Agency of Salt Lake County, 913 P.2d 723 (Utah 1995), the Utah Supreme Court explained,

> The primary rule guiding us in statutory interpretation is that we give effect to the intent of the legislature. To discover that intent, we look first to the plain language of the statute. "Unambiguous language in [a] statute may not be interpreted to contradict its plain meaning." In construing a statute, we assume that "each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." "Only when we find ambiguity in the statute's plain language need we seek guidance from the legislative history and relevant policy considerations."
>
> ....
>
> ...[W]e assume "each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable."

Id. at 727-729 (citations omitted).

10 Unlike the federal constitution's implied separation of powers doctrine, the Utah Constitution contains an express requirement for separation of government powers. In article V section 1, it states,

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

11 As is explained in section 46.03 of Sutherland, Statutory Construction,

> The preference for literalism in determining the effect of statute is based on the constitutional doctrine of separation of powers. The courts owe fidelity to the will of the legislature. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature. The Rhode Island Supreme Court has captured this idea in the following language: "It is an elementary proposition that courts only determine by construction the scope and intent of the law when the law itself is ambiguous or doubtful. If a law is plain and within the legislative power, it declares itself and nothing is left for interpretation. It is as binding upon the court as upon every citizen. To allow a court, in such a case, to say that the law must mean something different from the common import of its language, because the court may think that its penalties are unwise or harsh would make the judicial superior to the legislative branch of the

government, and practically invest it with the lawmaking power. The remedy for a harsh law is not in interpretation but in amendment or repeal.

Id. (citation omitted).

12 For instance, the Merriam-Webster Dictionary defines the term **render** as follows: 1: to extract (as lard) by heating 2: DELIVER, GIVE; *also:* YIELD 3: to give in return 4: to do (a service) for another <~aid> 5: to cause to be or become: MAKE 6: to reproduce or represent by artistic or verbal means 7: TRANSLATE <~ into English>

13 In addition to the statutes providing the plaintiffs' rights to appeal, Utah Code Ann. sections 17-27-810 and 1001, Article I section 11 of the Utah Constitution provides,

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Article I section 7 to the Utah Constitution complements the open courts provision, guaranteeing due process of law. See generally Berry by and through Berry v. Beech Aircraft Corp., 717 P.2d 670, 675-76 (Utah 1985)(interpreting Article I sections 7 and 11 as requiring fair and equal access to the courts for protection of fundamental rights and for remedies for injuries to people, property and reputations).

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 1996, I mailed in the United States mail, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLANTS to:

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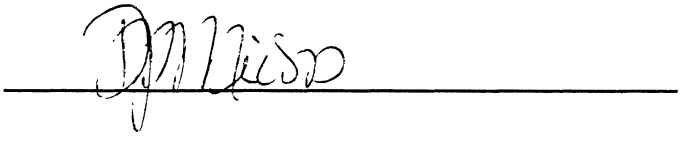


ADDENDUM

EXHIBIT A

210 (1952) (interpreting former § 57-5-4 with § 17-5-233 and former § 27-3-3).

A statutory dedication by the filing of plats of a subdivision vests a fee title in the municipality or county to the streets shown therein. Oregon Short Line R.R. v. Murray City, 2 Utah 2d 427, 277 P.2d 798 (1954).

Location of streets.

—Present use.

The court rejected as unsound the argument that streets could not be located on the plat of a township unless the street was already in use. Hall v. North Ogden City, 109 Utah 304, 166 P.2d 221, judgment set aside on other grounds on rehearing, Hall v. North Ogden City, 109 Utah 325, 175 P.2d 703 (1946).

Rights of owners of abutting land.

—Boundary by acquiescence.

Where county owned street separating property owned by two parties, the doctrine of boundary by acquiescence could not apply since the requirement that the parties be "adjoining" landowners was not met. Condas v. Willesen, 674 P.2d 115 (Utah 1983).

—Damages.

The owner of abutting land is not entitled to damages for the laying of a city water main in a street in a platted subdivision where the permission of the commissioners of the county in which the street is situated has been obtained. White v. Salt Lake City, 121 Utah 134, 239 P.2d 210 (1952).

COLLATERAL REFERENCES

C.J.S. — 26 C.J.S. Dedication § 22.
Key Numbers. — Dedication ⇐ 19(1).

17-27-808. Vacating or changing a subdivision plat.

(1) (a) The county legislative body or any other officer that the legislative body designates by ordinance may, with or without a petition, consider any proposed vacation, alteration, or amendment of a subdivision plat, any portion of a subdivision plat, or any street, lot, or alley contained in a subdivision plat at a public hearing.

(b) If a petition is filed, the responsible body or officer shall hold the public hearing within 45 days after it is filed if:

(i) the plat change includes the vacation of a public street or alley;

(ii) any owner within the plat notifies the municipality of their objection in writing within ten days of mailed notification; or

(iii) a public hearing is required because all of the owners in the subdivision have not signed the revised plat.

(2) Any fee owner, as shown on the last county assessment rolls, of land within the subdivision that has been laid out and platted as provided in this part may, in writing, petition the legislative body to have the plat, any portion of it, or any street or lot contained in it, vacated, altered, or amended as provided in this section.

(3) A petition to vacate, alter, or amend an entire plat, a portion of a plat, or a street or lot contained in a plat shall include:

(a) the name and address of all owners of record of the land contained in the entire plat;

(b) the name and address of all owners of record of land adjacent to any street that is proposed to be vacated, altered, or amended; and

(c) the signature of each of these owners who consents to the petition.

(4) (a) Petitions that lack the consent of all owners referred to in Subsection (3) may not be scheduled for consideration at a public hearing before the responsible body or officer until the notice required by this part is given.

(b) The petitioner shall pay the cost of the notice.

(5) When the responsible body or officer proposes to vacate, alter, or amend a subdivision plat, or any street or lot contained in a subdivision plat, they

shall consider the issue at a public hearing after giving the notice required by this part.

(6) Petitions to adjust lot lines between adjacent properties may be executed upon the recordation of an appropriate deed if:

(a) no new dwelling lot or housing unit results from the lot line adjustment;

(b) the adjoining property owners consent to the lot line adjustment;

(c) the lot line adjustment does not result in remnant land that did not previously exist; and

(d) the adjustment does not result in violation of applicable zoning requirements.

History: C. 1953, 17-27-808, enacted by L. 1991, ch. 235, § 101; 1995, ch. 179, § 18.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, inserted "or any other officer that the legislative body designates by ordinance" in Subsection (1)(a); substituted "responsible body or officer" for "county legislative body" in Subsection (1)(b) and for "legislative body" in Subsections (4)(a) and (5); added Subsections (1)(b)(i) to (1)(b)(iii) and (6); and made a stylistic change.

Effective Dates. — Laws 1991, ch. 235, § 110 makes the act effective on July 1, 1992.

COLLATERAL REFERENCES

Utah Law Review. — The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action, 1988 Utah L. Rev. 569.

NOTES TO DECISIONS

Statutory history.

The origin of former section in the Laws of 1894 and its later status are given in Hall v. North Ogden City, 109 Utah 304, 166 P.2d 221.

C.J.S. — 26 C.J.S. Dedication § 60.

17-27-809. Notice of hearing for plat change.

(1) (a) The responsible body or officer shall give notice of the proposed plat change by mailing the notice to all owners referred to in Section 10-9-808, addressed to their mailing addresses appearing on the rolls of the county assessor of the county in which the land is located.

(b) The responsible body or officer shall ensure that the notice includes:

(i) a statement that anyone objecting to the proposed plat change must file a written objection to the change within ten days of the date of the notice;

(ii) a statement that if no written objections are received by the legislative body within the time limit, no public hearing will be held; and

(iii) the date, place, and time when a hearing will be held, if one is required, to consider a vacation, alteration, or amendment without a *petition when written objections are received or to consider any* petition that does not include the consent of all land owners as required by Section 17-27-808.

(2) If the proposed change involves the vacation, alteration, or amendment of a street, the responsible body or officer shall give notice of the date, place, and time of the hearing by:

(a) mailing notice as required in Subsection (1); and

(b) either:

(i) publishing the notice once a week for four consecutive weeks before the hearing in a newspaper of general circulation in the county in which the land subject to the petition is located; or

(ii) if there is no newspaper of general circulation in the county, post the notice for four consecutive weeks before the hearing in three public places in that county.

History: C. 1953, 17-27-809, enacted by L. 1991, ch. 235, § 102; 1995, ch. 179, § 19.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, rewrote Subsection (1), adding the provisions specifying the contents of the notice and, in Subsection (2) and the beginning of Subsection (1), substituted "responsible body or officer" for "legislative body."

Effective Dates. — Laws 1991, ch. 235, § 110 makes the act effective on July 1, 1992.

17-27-810. Grounds for vacating or changing a plat.

(1) (a) Within 30 days after the public hearing required by this part, the responsible body or officer shall consider the petition.

(b) If the responsible body or officer is satisfied that neither the public nor any person will be materially injured by the proposed vacation, alteration, or amendment, and that there is good cause for the vacation, alteration, or amendment, the legislative body, by ordinance, may vacate, alter, or amend the plat, any portion of the plat, or any street or lot.

(c) The responsible body or officer may approve the vacation, alteration, or amendment by ordinance, amended plat, administrative order, or deed containing a stamp or mark indicating approval by the responsible body or officer.

(d) The responsible body or officer shall ensure that the vacation, alteration, or amendment is recorded in the office of the county recorder in which the land is located.

(2) An aggrieved party may appeal the responsible body's or officer's decision to district court as provided in Section 17-27-1001.

History: C. 1953, 17-27-810, enacted by L. 1991, ch. 235, § 103; 1995, ch. 179, § 20.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, substituted "responsible body or officer" for "legislative body" in four places, added Subsection (1)(c), and redesignated former Subsection (1)(c) as Subsection (1)(d).

Effective Dates. — Laws 1991, ch. 235, § 110 makes the act effective on July 1, 1992.

NOTES TO DECISIONS

Civil liability.

The purpose of former §§ 57-5-5 and 17-27-21 was to impose a duty running to the sovereign, and a violation thereof did not necessarily give rise to civil liability. Ellis v. Hale, 13 Utah 2d 279, 373 P.2d 382 (1962).

COLLATERAL REFERENCES

C.J.S. — 26 C.J.S. Dedication § 23.

17-27-811. Penalties.

(1) (a) Any county recorder who files or records a plat of a subdivision without the approvals required by this part is guilty of a misdemeanor.

EXHIBIT B

PART 10

APPEALS AND ENFORCEMENT

17-27-1001. Appeals.

(1) No person may challenge in district court a county's land use decisions made under this chapter or under the regulation made under authority of this chapter until they have exhausted their administrative remedies.

(2) Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.

(3) The courts shall:

(a) presume that land use decisions and regulations are valid; and

(b) determine only whether or not the decision is arbitrary, capricious, or illegal.

History: C. 1953, 17-27-1001, enacted by L. 1991, ch. 235, § 106.

Effective Dates. — Laws 1991, ch. 235, § 110 makes the act effective on July 1, 1992.

NOTES TO DECISIONS

ANALYSIS

Exhaustion of administrative remedies.
Violation of zoning resolution.

Exhaustion of administrative remedies.

Plaintiff seeking to enjoin construction of a trailer park was required to exhaust his administrative remedies before an action for injunctive relief could be maintained. Lund v. Cottonwood Meadows Co., 15 Utah 2d 305, 392 P.2d 40 (1964).

A party must exhaust administrative remedies before seeking judicial review of the denial of a building permit. Hatch v. Utah County Planning Dep't, 685 P.2d 550 (Utah 1984).

Plaintiff aggrieved by a decision of the county commission applying the zoning ordinance was required to appeal that decision to the board of adjustment; plaintiff could not initiate mandamus proceedings under § 17-27-1002 against the commission for its alleged violation of the ordinance. Bennion v. Sundance Dev. Corp., 267 Utah Adv. Rep. 26 (Utah Ct. App. 1995).

Violation of zoning resolution.

Landowners under former § 17-27-23 had a separate cause of action in the courts when a violation of a zoning resolution was charged; but where the alleged violation of the ordinance arose from the administration of the zoning ordinance by an administrative agency, appeal from the administrative ruling should have been taken to the proper administrative tribunal, or a suit should have been commenced in the courts within ninety days. Lund v. Cottonwood Meadows Co., 15 Utah 2d 305, 392 P.2d 40 (1964) (decided under former § 17-27-15).

17-27-1002. Enforcement.

(1) (a) A county, county attorney, or any owner of real estate within the county in which violations of this chapter or ordinances enacted under the authority of this chapter occur or are about to occur may, in addition to other remedies provided by law, institute:

(i) injunctions, mandamus, abatement, or any other appropriate actions; or

(ii) proceedings to prevent, enjoin, abate, or remove the unlawful building, use, or act.

(b) A county need only establish the violation to obtain the injunction.

EXHIBIT C

tion. Meagher v. Equity Oil Co., 5 Utah 2d 196, 299 P.2d 827 (1956).

Cited in Boskovich v. Utah Constr. Co., 123 Utah 387, 259 P.2d 885 (1953); Thomas v. Heirs of Braffet, 6 Utah 2d 57, 305 P.2d 507 (1956).

COLLATERAL REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d Motions, Rules, and Orders § 1 et seq.; 61A Am. Jur. 2d Pleading §§ 1 et seq., 238.

C.J.S. — 60 C.J.S. Motions and Orders § 1 et seq.; 71 C.J.S. Pleading §§ 63 to 210, 140 et seq., 211 et seq.

A.L.R. — Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Key Numbers. — Motions ⇐ 1 et seq.; Pleading ⇐ 38½ to 186, 187 et seq.

Rule 8. General rules of pleadings.

(a) **Claims for relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) **Defenses; form of denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) **Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(d) **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) **Pleading to be concise and direct; consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal

or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) **Construction of pleadings.** All pleadings shall be so construed as to do substantial justice.

Compiler's Notes. — This rule is substantially the same as Rule 8, F.R.C.P.

Cross-References. — Amended and supplemental pleadings, U.R.C.P. 15.
Arbitration, § 78-31a-1 et seq.
Comparative negligence, § 78-27-38.
Counterclaim and cross-claim, U.R.C.P. 13.
Creditors, assignment for benefit of, § 6-1-1 et seq.
Defenses and objections, U.R.C.P. 12.
Fee for filing cross-claim or counterclaim, §§ 21-1-5, 78-6-14.
Fellow servant defined, § 34-25-2.
Form of pleadings, U.R.C.P. 10.
Forms intended to indicate simplicity and brevity of statement, U.R.C.P. 84.
Forms of answers, Forms 21, 22.
Hearing of certain defenses before trial, U.R.C.P. 12(d).
Interpleader, U.R.C.P. 22.
Motions, forms for, Forms 20, 23, 24.
Numbered paragraphs, U.R.C.P. 10(b).
One form of action, U.R.C.P. 2.
Reply to answer, order for, U.R.C.P. 7(a).
Security interest, enforceability of, § 70A-9-203.
Special forms of pleadings and writs abolished, U.R.C.P. 65B(a).
Statute of frauds, generally, § 25-5-1 et seq.
Statute of frauds, investment securities, § 70A-8-319.
Statute of frauds, sales, § 70A-2-201.
Statute of frauds, Uniform Commercial Code, personal property not otherwise covered, § 70A-1-206.
Third-party practice, U.R.C.P. 14.
Time for answer, U.R.C.P. 12(a).
Uniform Commercial Code, supplementary principles of law applicable, § 70A-1-103.

NOTES TO DECISIONS

ANALYSIS

Affirmative defenses.

—Accord and satisfaction.

——Pleading.

Accord and satisfaction is an affirmative defense which must be pleaded in the answer in order to be raised; in action to recover wages and commissions allegedly due to plaintiff, where defendant did not raise the defense in his answer, he could not subsequently rely on it. Hintze v. Seaich, 20 Utah 2d 275, 437 P.2d 202 (1968).

Assertion of accord and satisfaction is generally raised by way of affirmative defense to an action on the original agreement, and when so raised, it must be properly pleaded. Sugarhouse Fin. Co. v. Anderson, 610 P.2d 1369 (Utah 1980).

——Time limitation.

In action to rescind loan secured by mortgage, where defendant mortgagee failed to answer amended complaint within ten days after service thereof under Rule 15, but filed motion for permission to set forth accord and satisfaction one week before trial, refusal was not abuse of court's discretion. Wasescha v. Terra, Inc., 528 P.2d 802 (Utah 1974).

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for securities fraud, 97 A.L.R. Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for infliction of emotional distress, 98 A.L.R. Fed. 442.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in antitrust actions, 99 A.L.R. Fed. 573.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 100 A.L.R. Fed. 556.

Key Numbers. — Pleading ⇐ 287 to 304.

Rule 12. Defenses and objections.

(a) **When presented.** A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary hearings.** The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of defenses.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) **Pleading after denial of a motion.** The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) **Security for costs of a nonresident plaintiff.** When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a $300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) **Effect of failure to file undertaking.** If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action. (Amended effective Sept. 4, 1985; April 1, 1990.)

Compiler's Notes. — This rule is similar to Rule 12, F.R.C.P.

Cross-References. — Motions generally, U.R.C.P. 7.

NOTES TO DECISIONS

ANALYSIS

Jurisdiction over the person.
Motion for judgment on pleadings.
—Matters outside of pleadings.
——Answers to interrogatories.
——Rights of opposing party.
Motion for more definite statement.
—Bill of particulars.
—Criteria.
—Motion to dismiss distinguished.
—Purpose.
——Delay.
——Obtaining evidence.
Motion to dismiss for failure to state a claim.

action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

Key Numbers. — Trial ⇐ 182 to 296.

Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(1) by default or by failing to appear at the trial;

(2) by consent in writing, filed in the cause;

(3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is similar to Rule 52, F.R.C.P.

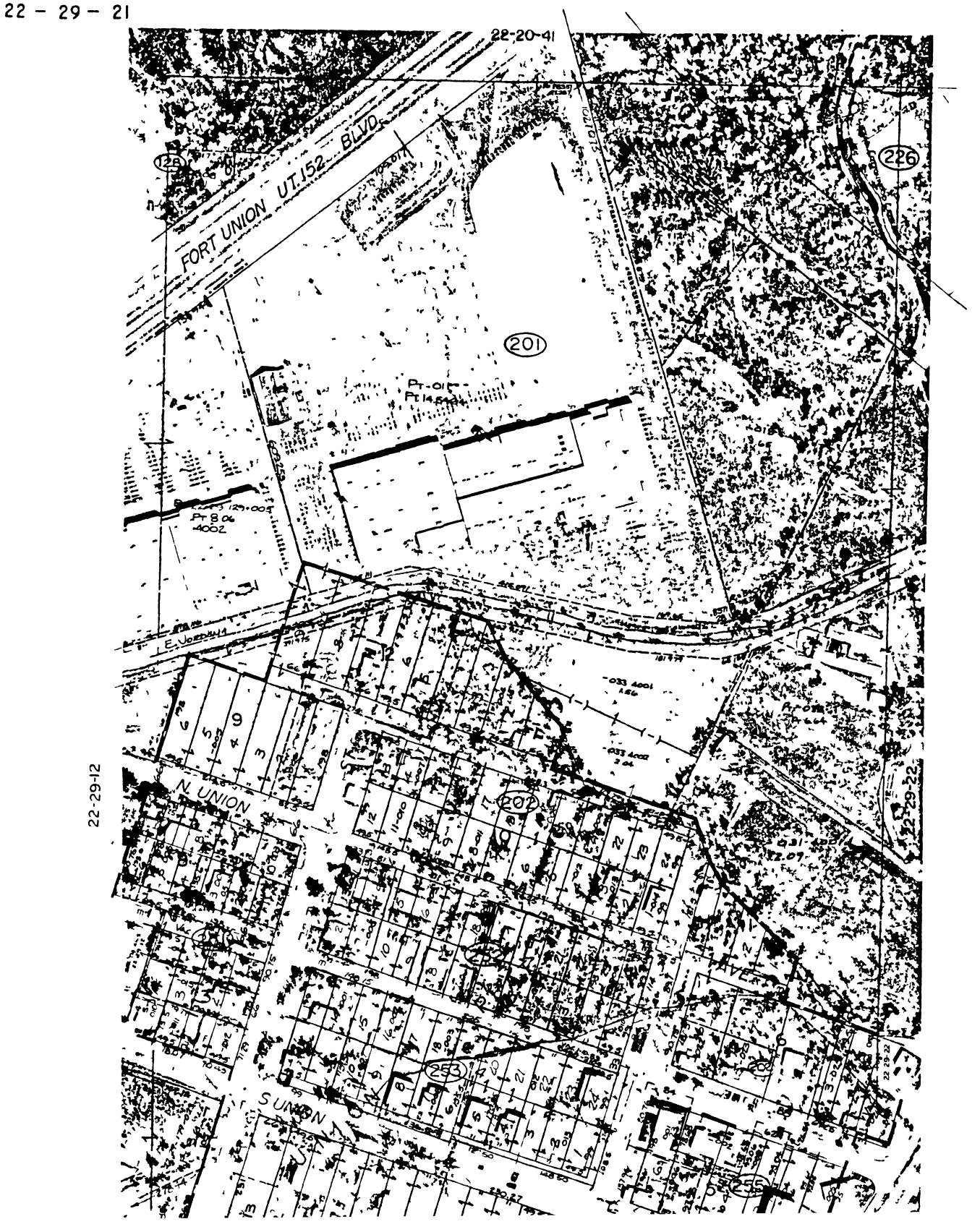
NOTES TO DECISIONS

ANALYSIS

Adoption.
—Abandonment of contract.
—Advisory verdict.
—Breach of contract.
—Child custody.
—Credibility of witnesses.
—Denial of motion.
—Divorce decree modifications.
—Easement.
—Evidentiary disputes.

EXHIBIT D

Exhibit "A"


22 - 29 - 21
22-20-41
FORT UNION UT.152 BLVD.
226
201
Pt-01
Pt 14.6
Pt 8.0
4002
E. JOSEPH
22-29-12
N. UNION
202
S UNION
253
255
22-29-22

SCALE 1"=100'

22-29-21

W1/2 NE1/4 SEC 29 T 2S R 1E

EXHIBIT E

*723 913 P.2d 723

**Eva C. JOHNSON, C. Eugene Croxford, Burton J. Arrington,
Cammon I. Arrington, Jeffrey B. Arrington, Irby N.
Arrington, B-J Dry Cleaning and Shirt Laundering, 4-A
Alliance, Arthur Milne, Thomas Lloyd, Union Park Center
Associates, Plaintiffs and Appellants,
v.
The REDEVELOPMENT AGENCY OF SALT LAKE COUNTY, Jerold H.
Barnes, the Salt Lake County Commission, and the Salt Lake County Commissioners,
individually, Defendants and Appellees,
Hermes & Associates, Intervenor.**

No. 940165.
Supreme Court of Utah.
Nov. 2, 1995.
Rehearing Denied March 26, 1996.

Residential property owner brought action against county redevelopment agency and county commission, challenging legality and regularity of county ordinance adopting redevelopment plan. Owner and agency moved for summary judgment. The District Court, Salt Lake County, Michael R. Murphy, J., granted agency's motions and denied owner's motion, ruling that agency had sufficiently complied with procedures set out in Utah Neighborhood Development Act to make ordinance valid. Owner appealed. The Supreme Court, Zimmerman, C.J., held that: (1) amended provision of Act, requiring that finding that redevelopment project area is blighted area be made by agency at time preliminary plan for project is prepared and by legislative body prior to adopting plan, applied retroactively to redevelopment project for which preliminary plan was prepared before effective date of statutory amendment; (2) agency did not comply with Act provision and, thus, resulting ordinance adopting redevelopment plan was invalid, despite contention that agency complied with provision by having generic belief that area was blighted when it decided to prepare preliminary plan; and (3) commission's preliminary vote, concluding that owner's property was blighted, was not formal "finding of blight" so as to trigger right under Act to de novo review of finding of blight and, thus, owner was not entitled to de novo review of preliminary vote.

Reversed and remanded.

1. MUNICIPAL CORPORATIONS ⚷267
   268 ----
   268IX Public Improvements
   268IX(A) Power to Make Improvements or Grant Aid Therefor
   268k267 Nature and purposes of improvements in general.

Utah 1995.
Purpose of Utah Neighborhood Development Act is to cure problem of blight through economic redevelopment. U.C.A.1953, 17A-2-1201 et seq.

2. APPEAL AND ERROR ⚷842(1)
   30 ----
   30XVI Review
   30XVI(A) Scope, Standards, and Extent, in General
   30k838 Questions Considered
   30k842 Review Dependent on Whether Questions Are of Law or of Fact
   30k842(1) In general.

Utah 1995.
On appeal, Supreme Court would grant no particular deference to district court's statutory interpretations but would review them for correctness.

3. APPEAL AND ERROR ⚷841
   30 ----
   30XVI Review
   30XVI(A) Scope, Standards, and Extent, in General
   30k838 Questions Considered
   30k841 Review where facts are not disputed.

Utah 1995.
When no facts are in dispute, challenge to summary judgment presents only conclusions of law.

4. MUNICIPAL CORPORATIONS ⚷267
   268 ----
   268IX Public Improvements
   268IX(A) Power to Make Improvements or Grant Aid Therefor
   268k267 Nature and purposes of improvements in general.

Utah 1995.
Proper construction of Utah Neighborhood Development Act is question of law. U.C.A.1953, 17A-2-1201 et seq.

5. STATUTES ⚷181(1)
   361 ----
   361VI Construction and Operation
   361VI(A) General Rules of Construction
   361k180 Intention of Legislature
   361k181 In General

361k181(1) In general.
Utah 1995.
Primary rule guiding Supreme Court in statutory interpretation is that Court gives effect to intent of legislature.

6. STATUTES ⚷188
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 In general.
Utah 1995.
To discover intent of legislature, Supreme Court looks first to plain language of statute.

7. STATUTES ⚷189
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k189 Literal and grammatical interpretation.

[See headnote text below]

7. STATUTES ⚷212.6
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.6 Words used.
Utah 1995.
In construing statute, Supreme Court assumes that each term in statute was used advisedly; thus, statutory words are read literally unless such reading is unreasonably confused or inoperable.

8. STATUTES ⚷184
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 Policy and purpose of act.

[See headnote text below]

8. STATUTES ⚷217.4
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 Legislative history in general.
Utah 1995.
Only when Supreme Court finds ambiguity in statute's plain language does Court need to seek guidance from legislative history and relevant policy considerations.

9. MUNICIPAL CORPORATIONS ⚷266
268 ----
268IX Public Improvements
268IX(A) Power to Make Improvements or Grant Aid Therefor
268k266 Constitutional and statutory provisions.
Utah 1995.
Amended provision of Utah Neighborhood Development Act, requiring that finding that redevelopment project area is blighted area be made by agency at time preliminary plan for project is prepared and by legislative body prior to adopting plan, applied retroactively to redevelopment project for which preliminary plan was prepared before effective date of statutory amendment; fact that nonretroactivity language was attached only to certain of amended Act provisions and not to others was clear indication that legislature intended to exempt ongoing redevelopment projects only from those specific sections containing nonretroactivity clauses, not from provisions of amended Act as a whole. U.C.A.1953, 17A-2-1208(1).

10. MUNICIPAL CORPORATIONS ⚷299
268 ----
268IX Public Improvements
268IX(B) Preliminary Proceedings and Ordinances or Resolutions
268k299 Determination as to necessity and utility of improvement.
Utah 1995.
County redevelopment agency did not comply with Utah Neighborhood Development Act provision requiring that finding, that redevelopment project area is blighted area, be made by agency at time preliminary plan for project is prepared and, thus, resulting ordinance adopting redevelopment plan was invalid, despite contention that agency complied with provision by having generic belief that area was blighted when it decided to prepare preliminary plan; generic belief was inconsistent with common meaning of term "finding," such construction of term "finding" was inconsistent with purpose and intent of legislature in enacting Act, and such construction was unworkable when applied to term "finding" in other provisions in same Act section. U.C.A.1953, 17A-2-1208(1).

11. MUNICIPAL CORPORATIONS ⚷282(1)
268 ----
268IX Public Improvements
268IX(A) Power to Make Improvements or

Grant Aid Therefor
268k282 Basis or Plan of Improvements
268k282(1) In general.
Utah 1995.

*723 Because area redevelopment is serious action that may be in derogation of individual property rights, strict compliance with enabling legislation is required to enact ordinance setting up redevelopment plan. U.C.A.1953, 17A-2-1208(1).

12. MUNICIPAL CORPORATIONS ⚷267
268 ----
268IX Public Improvements
268IX(A) Power to Make Improvements or Grant Aid Therefor
268k267 Nature and purposes of improvements in general.
Utah 1995.

Utah Neighborhood Development Act is broad in scope and must be interpreted to delegate to agencies ample power to serve purposes of Act. U.C.A.1953, 17A-2-1201 et seq.

13. MUNICIPAL CORPORATIONS ⚷267
268 ----
268IX Public Improvements
268IX(A) Power to Make Improvements or Grant Aid Therefor
268k267 Nature and purposes of improvements in general.
Utah 1995.

Utah Neighborhood Development Act, which must be interpreted to delegate to agencies ample power to serve purposes of Act, must be strictly followed. U.C.A.1953, 17A-2-1201 et seq.

14. STATUTES ⚷223.2(.5)
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.2 Statutes Relating to the Same Subject Matter in General
361k223.2(.5) In general.
Utah 1995.

Supreme Court does not construe particular section of state statutory code in the abstract but, rather, in manner that is harmonious with other closely related code provisions.

15. MUNICIPAL CORPORATIONS ⚷299
268 ----
268IX Public Improvements
268IX(B) Preliminary Proceedings and Ordinances or Resolutions
268k299 Determination as to necessity and utility of improvement.
Utah 1995.

Utah Neighborhood Development Act provision requiring that finding, that redevelopment project area is blighted area, be made by agency at time preliminary plan for project is prepared contemplates formal, written finding that area is blighted before preliminary plan is prepared for that area. U.C.A.1953, 17A-2-1208(1).

16. MUNICIPAL CORPORATIONS ⚷321(2)
268 ----
268IX Public Improvements
268IX(B) Preliminary Proceedings and Ordinances or Resolutions
268k321 Review of Proceedings
268k321(1) Right to Review in General
268k321(2) As to necessity or utility.
Utah 1995.

Preliminary vote of county commission, concluding that owner's residential property was blighted, was not formal "finding of blight" so as to trigger right under Utah Neighborhood Development Act to de novo review of finding of blight and, thus, owner was not entitled to de novo review of preliminary vote. U.C.A.1953, 17A-2-1208(3).

See publication Words and Phrases for other judicial constructions and definitions.

17. MUNICIPAL CORPORATIONS ⚷299
268 ----
268IX Public Improvements
268IX(B) Preliminary Proceedings and Ordinances or Resolutions
268k299 Determination as to necessity and utility of improvement.

[See headnote text below]

17. MUNICIPAL CORPORATIONS ⚷321(2)
268 ----
268IX Public Improvements
268IX(B) Preliminary Proceedings and Ordinances or Resolutions
268k321 Review of Proceedings
268k321(1) Right to Review in General
268k321(2) As to necessity or utility.
Utah 1995.

For purposes of Utah Neighborhood Development Act provisions, requiring that finding that redevelopment project area is blighted area be made by agency at time preliminary plan for project is prepared and by legislative body prior to adopting plan, and governing property owner's right to de novo

review of finding of blight by agency or governing body, "finding of blight" means formal, written finding that area is blighted. U.C.A.1953, 17A-2-1208(1, 3).

See publication Words and Phrases for other judicial constructions and definitions.

***724** Third District, Salt Lake County; The Honorable Michael R. Murphy.

***725** Nolan J. Olsen, Martin N. Olsen, Midvale, and Walter F. Bugden, Salt Lake City, for Johnson, Harold A. Hintze, Salt Lake City, for Barnes and the Redevelopment Agency.

Paul G. Maughan, Douglas R. Short, Salt Lake City, for the County Commission.

Nick J. Colessides, Salt Lake City, for Hermes.

ZIMMERMAN, Chief Justice:

Eva C. Johnson appeals from a grant of summary judgment in favor of the defendants, the Redevelopment Agency of Salt Lake County ("the RDA") (FN1) and the Salt Lake County Commission ("the Commission"). Johnson and others brought suit under the 1993 version of the Utah Neighborhood Development Act, (FN2) challenging the legality and regularity of a Salt Lake County ordinance adopting the Union Fort Redevelopment Plan. After each side moved for summary judgment, the district court granted defendants' motions and denied Johnson's, ruling that the RDA had sufficiently complied with the procedures set out in the 1993 Act to make the ordinance valid. (FN3) We reverse and remand to the district court to enter judgment in favor of Johnson in accordance with this opinion.

[1] By way of background, the purpose of Utah's Neighborhood Development Act is to cure the problem of "blight" through economic redevelopment of the blighted area. *Redevelopment Agency v. Tanner,* 740 P.2d 1296, 1297 (Utah 1987) ("Acquisition and redevelopment of 'blighted' property contributes to the health of the community."). The first step in the redevelopment process is the designation of a redevelopment survey area. Utah Code Ann. § 17A-2-1204. After boundaries are set for the survey area, the properties within the area are studied to determine if economic redevelopment is feasible. *Id.* If redevelopment is feasible, the RDA may formulate a preliminary plan for the redevelopment of all or part of the survey area. *Id.* § 17A-2-1206. Once the RDA approves a preliminary plan, it is submitted to the legislative body (i.e., city council or county commission) for ultimate approval. *Id.* §§ 17A-2-1215, -1225, -1227. "Upon adoption by the legislative body the agency shall carry out the redevelopment project set forth in the plan." *Id.* § 17A-2-1215. The RDA is empowered to use increased tax revenues generated by the redevelopment to fund the project. *Id.* § 17A-2-1247. "[B]ecause redevelopment is a serious action that may be in derogation of individual property rights," *Salt Lake County v. Murray City Redevelopment,* 598 P.2d 1339, 1344 (Utah 1979), the Utah Neighborhood Development Act contains numerous safeguards to protect property owners. For instance, eminent domain may not be used by the RDA if the purpose of the plan is economic development unless the area to be developed is first found to be blighted. Utah Code Ann. §§ 17A-2-1208, -1209.

With this background in mind, we move on to the instant case. The dispositive facts are undisputed. At the heart of this case are a 22.5-acre tract of land and a 4.3-acre tract of land, both located in an unincorporated portion of Salt Lake County. At the beginning of the events in question, a portion of the 22.5-acre tract was owned by Hermes & Associates, Ltd., an intervenor in this case. By the time this appeal was argued, however, Hermes owned all of the property in both parcels except for Johnson's.

***726** In 1991, Hermes operated a shopping center known as the Family Center at Fort Union on property adjacent to the two tracts of land in question. As a shopping center developer, Hermes wanted to expand its Family Center operations onto the 22.5-acre tract. In furtherance of this desire, on October 14, 1991, Hermes requested that the RDA designate the 22.5-acre tract as a redevelopment survey area. *See id.* § 17A-2-1207 (1991). The RDA complied with Hermes' request and passed a resolution designating the 22.5-acre parcel as the "Union Family Center Redevelopment Survey Area." This survey area was to be studied to determine if redevelopment was feasible. The Commission then met and facilitated the study by changing the county's master plan to accommodate the use Hermes proposed for the survey area.

In June of 1992, after deciding that even more land was needed for the proposed expansion of its shopping center, Hermes requested that an additional 4.3 acres be added to the survey area. The request was granted by the RDA in September, and the Commission again changed the master plan to accommodate the proposed expansion. Plaintiff

Johnson's property, a residence, was included in the additional 4.3 acres.

On November 18, 1991, while only the original 22.5-acre tract was proposed for redevelopment, the RDA hired independent consultants to study the survey area to determine whether "blight" existed and to assess the proposed redevelopment's impact on the area's traffic and economy. The consultants completed and published the blight survey in November of 1992. The final completed survey concluded that the whole survey area, including the additional 4.3 acres upon a portion of which Johnson's residence stands, was blighted and in need of redevelopment. The RDA then prepared a preliminary redevelopment plan, dated November 16, 1992, and published notice of a public hearing to be held on the consultants' blight survey and the preliminary redevelopment plan. Johnson and others filed their first complaint, seeking to delay the evidentiary hearing regarding blight.

The hearing eventually commenced on February 9th and was continued over a number of nonconsecutive days. It was held jointly before the Commission and the RDA. Redevelopment experts, real estate appraisers, and others presented evidence on the area's blight. On March 8, 1993, the members of the RDA voted unanimously to designate the entire survey area, including Johnson's property, as blighted. The RDA then referred the matter to the office of the county attorney to prepare written findings of fact regarding blight.

Although the RDA had already made its preliminary determination that the survey area was blighted, the hearing continued on March 16, 1993, to consider other matters related to the redevelopment project. At this meeting, Johnson testified that she would "hold out" and not sell her property to Hermes. On March 24th, Johnson and others filed an amended complaint in the district court under section 17A-2-1208(3)(b) of the 1993 Act, seeking de novo review by the district court of the March 8, 1993, blight determination. (FN4) At the time the complaint was filed, each of the plaintiffs owned property within the survey area. However, during the course of the instant legal action, all but Johnson eventually sold their properties to Hermes.

On April 19th, the RDA directed the county attorney to exclude the Johnson property from the redevelopment area. As a result of this action, Johnson's property, which was the only parcel excluded from the proposed redevelopment area, was left surrounded on three sides by the project. This exclusion was effected without any further public hearings. At this same April 19th meeting, the RDA and the Commission included provisions in the plan for the use of eminent domain against any landowners unwilling to sell to Hermes and confirmed the plan's authorization ***727** of the use of sales taxes from the project area to pay for the redevelopment project.

On May 5, 1993, while Johnson's action was pending in the district court, the RDA and the Commission adopted written, formal findings of fact regarding blight and prepared an ordinance to create the Union Fort Neighborhood Redevelopment Project Area, which excluded the Johnson property. On May 24, 1993, after further revisions, the Commission drafted the final ordinance, which was passed at the close of the meeting.

On June 23rd, Johnson filed an amended ten-count complaint challenging, under the 1993 Act, the regularity and legality of the redevelopment process and of the resulting plan and ordinance. Specifically, Johnson sought to invalidate the ordinance passed on May 24, 1993. Both Johnson and the RDA sought summary judgment. On January 12, 1994, the district court granted the RDA's motions and denied Johnson's. On the merits, the district court ruled that RDA had substantially complied with all of the applicable provisions of the 1993 Act. The district court also dismissed Johnson's demand for de novo review of the March 8th blight finding by holding that Johnson lacked standing to invoke section 17A-2-1208(3)(b) of the 1993 Act because she was not an owner of property within the redevelopment area. Johnson appeals.

[2][3][4] We first state the applicable standard of review. "When no facts are in dispute, a challenge to a summary judgment presents only conclusions of law." *Texaco, Inc. v. San Juan County,* 869 P.2d 942, 943 (Utah 1994). Furthermore, the proper construction of the Utah Neighborhood Development Act is a question of law. *See State v. Larsen,* 865 P.2d 1355, 1357 (Utah 1993); *State v. James,* 819 P.2d 781, 796 (Utah 1991). Accordingly, we grant no particular deference to the district court's statutory interpretations but review them for correctness. *World Peace Movement of Am. v. Newspaper Agency Corp.,* 879 P.2d 253, 259 (Utah 1994); *accord Ward v. Richfield City,* 798 P.2d 757, 759 (Utah 1990).

[5][6][7][8] The primary rule guiding us in statutory interpretation is that we give effect to the intent of the legislature. *Sullivan v. Scoular Grain Co. of Utah,* 853 P.2d 877, 880 (Utah 1993). To discover that intent, we look first to the plain language of the

statute. *Larsen,* 865 P.2d at 1357; *Schurtz v. BMW of N. Am., Inc.,* 814 P.2d 1108, 1112 (Utah 1991); *Brinkerhoff v. Forsyth,* 779 P.2d 685, 686 (Utah 1989); *see also Bonham v. Morgan,* 788 P.2d 497, 500 (Utah 1989) (per curiam) ("Unambiguous language in [a] statute may not be interpreted to contradict its plain meaning."). In construing a statute, we assume that "each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." *Savage Indus., Inc. v. Utah State Tax Comm'n,* 811 P.2d 664, 670 (Utah 1991). "Only when we find ambiguity in the statute's plain language need we seek guidance from the legislative history and relevant policy considerations." *World Peace,* 879 P.2d at 259; *see also Schurtz,* 814 P.2d at 1112 ("We first look to the statute's plain language. Only if we find some ambiguity need we look further."); *Brinkerhoff,* 779 P.2d at 686 ("Where statutory language is plain and unambiguous, this Court will not look beyond the same to divine legislative intent.").

Johnson asks this court to invalidate the ordinance adopting the Fort Union Redevelopment Project on the ground that the RDA and the Commission failed to strictly comply with the procedural steps set out in the 1993 Act. (FN5) Specifically, Johnson claims that the RDA failed (i) to designate a project area at the time and in the manner outlined in section ***728** 17A-2-1206 of the 1993 Act; (ii) to prepare a preliminary plan at the time and in the manner outlined in section 17A-2-1208(1) of the 1993 Act; and (iii) to provide area residents and property owners with written notice and the opportunity to review and comment on the preliminary plan as required by sections 17A-2-1222 through -1225 of the 1993 Act.

Because we find Johnson's second claim dispositive, we limit our discussion to that issue: to wit, whether the RDA failed to prepare a preliminary plan in accordance with the provisions of section -1208(1) of the 1993 Act. That section provides as follows:

> If the redevelopment plan will authorize the use of eminent domain, the redevelopment project area described in the redevelopment plan must be a blighted area and *a finding that the area is a blighted area must be made by the agency at the time a preliminary plan is prepared, and must be made by the legislative body prior to adopting the plan* under Section 17A-2-1225.

Utah Code Ann. § 17A-2-1208(1) (emphasis added).

Before the district court, Johnson argued that the RDA failed to comply with section -1208(1) because it made a finding that the area to be included in the preliminary plan was blighted only *after* the preliminary plan was prepared, rather than "at the time a preliminary plan is prepared," as the 1993 Act requires. The Commission and RDA's argument in response is two-fold: (i) that section -1208(1) did not apply because the preliminary plan was prepared before that section of the 1993 Act was passed; and (ii) that even if section -1208(1) applies, they had "unwittingly complied" with its requirements by making a "generic" finding of blight at the time they prepared the preliminary plan and by referencing the blight survey in the preliminary plan. The district court agreed with the RDA and the Commission and ruled that "it appears that a sufficient finding of blight was in fact made in the Union Fort Preliminary Plan."

[9] On appeal, the parties simply restate the positions they took before the district court. We begin our analysis with the applicability of section -1208(1) of the 1993 Act to the Fort Union Redevelopment Project.

When the legislature substantially rewrote the Utah Neighborhood Development Act in 1993, it included a nonretroactivity clause in some, but not all, of the individual amended sections of the Act. (FN6) Johnson contends that if the legislature had intended to exclude all projects then in process from compliance with the 1993 Act, the legislature would have placed the nonretroactivity language in one section at the beginning of the Act and given it a blanket application or, alternatively, it would have included the language in each and every amended section. Instead, it chose to include a specific nonretroactivity clause in many, but not all, of the changed sections. This indicates an intention to make only selected provisions have prospective effect. Because the 1993 Act lacks a blanket nonretroactivity clause and no such clause is attached to section -1208(1), the plain language shows a legislative intention to apply the new provision to all then-pending redevelopment plans. The Commission and the RDA concede that the nonretroactivity language does not appear in every new or amended section of the 1993 Act, but they contend, "It is obvious that the 1993 amendments, read as a whole, indicate that the legislature intended H.B. 278 [the 1993 amendments] to apply prospectively and address redevelopment plans commenced after April 1, 1993."

***729** We agree with Johnson. The fact that the nonretroactivity language was attached only to certain

of the amended provisions and not to others is a clear indication that the legislature intended to exempt ongoing redevelopment projects only from those specific sections containing nonretroactivity clauses, not from the provisions of the 1993 Act as a whole. Under the construction placed on the 1993 Act by the Commission and the RDA, in essence, we would have to read each of the thirty-four nonretroactivity provisions out of the Act and, at the same time, read a blanket nonretroactivity provision back into the Act. This would conflict with the basic tenet of statutory construction that we assume "each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." *Savage,* 811 P.2d at 670.

[10][11][12][13] Having concluded that section -1208(1) of the 1993 Act applied to the Fort Union Redevelopment Project, we must next address the second issue: whether the RDA and the Commission complied with section -1208(1)'s requirement that "[i]f the redevelopment plan will authorize the use of eminent domain, the redevelopment project area described in the redevelopment plan must be a blighted area *and a finding that the area is a blighted area must be made by the agency at the time a preliminary plan is prepared.*" Utah Code Ann. § 17A-2-1208(1) (emphasis added). We proceed with the understanding that "because redevelopment is a serious action that may be in derogation of individual property rights, ... strict compliance with the enabling legislation is required to enact an ordinance setting up a redevelopment plan." *Murray City Redevelopment,* 598 P.2d at 1344. Although the Utah Neighborhood Development Act "is broad in scope and must be interpreted to delegate to the agencies ample power to serve the purposes of the Act, i.e., to alleviate blight, it is necessary that the legislation enabling this grant of authority be strictly followed." *Id.*

As noted above, section -1208(1) embodies the concern about the need for careful compliance with statutory prerequisites because of the potential impact of redevelopment on individual property owners. It mandates, "If the redevelopment plan will authorize the use of eminent domain, the redevelopment project area described in the redevelopment plan must be a blighted area *and a finding that the area is a blighted area must be made by the agency at the time a preliminary plan is prepared.*" Utah Code Ann. § 17A-2-1208(1) (emphasis added). Johnson argues that the RDA failed to comply with this provision because it prepared the preliminary redevelopment plan in November of 1992 but did not formally "find" that the area comprising the redevelopment was blighted until March 8, 1993.

The RDA and the Commission, on the other hand, argue that the RDA "unwittingly" complied with section -1208(1) when it prepared the preliminary plan. According to the RDA and the Commission, section -1208(1) does not require that the "finding" of blight "be by resolution, that it be reduced to writing, or meet any other formal requirement." A "finding" of blight, as that term is used in section -1208(1), means nothing more than a "generic" belief by the RDA that the area is blighted and that it has decided to prepare a preliminary plan designed to cure that supposed blight. The RDA notes that it was aware, as early as February 26, 1992, that the consultant conducting the blight survey had preliminarily determined that the area was blighted. It was on the basis of the consultant's final report, a report that was ultimately referenced in the preliminary plan, that the RDA directed that a preliminary plan be prepared. These actions, contends the RDA, are sufficient to meet the "generic" finding-of-blight requirement contained in section -1208(1).

We conclude that section -1208(1) contemplates much more than the "generic" finding of blight contended for by the RDA and the Commission. We reach this result because (i) the term "finding" is commonly understood to mean a formal, written determination of fact; (ii) the RDA and the Commission's construction of the term "finding" is inconsistent with the purpose and intent of the legislature in enacting the Utah Neighborhood Redevelopment Act; and (iii) the construction advocated by the Commission and the RDA is unworkable when applied to ***730** the identical term as it is used in other subparts of section -1208.

Although the terms "finding" and "finding of blight" are not defined in the 1993 Act, the term "finding" is commonly understood to connote a formal, written determination of a disputed issue by an adjudicative body. *See Versluis v. Guaranty Nat'l Cos.,* 842 P.2d 865, 867 (Utah 1992) (noting that in interpreting meaning of a given word or phrase, "we give effect to each term according to its ordinary and accepted meaning"). For instance, *Webster's New International Dictionary* defines the term "finding" as follows: "The result of a judicial examination or inquiry, esp. into some matter of fact, as embodied in a jury's verdict or a court's decision or a referee's report." *Webster's New Int'l Dictionary* 949 (2d ed. 1954). Furthermore, *American Jurisprudence* states, "Findings are a formal, deliberate statement of a court's determination of facts.... Findings of fact may be defined as the written statement of the ultimate facts as found by the court, signed by the

court, and filed therein, and essential to support the decision and judgment rendered therein." 75B Am.Jur.2d *Trial* § 1968 (1992). The RDA's assertion that a "finding" of blight is nothing more than a general consensus or an informal understanding among the commissioners that blight exists stands in stark contrast to the general usage of the term.

More important, the construction the Commission and the RDA place on section -1208(1) is inconsistent with the purpose of the 1993 Act. *See Sullivan,* 853 P.2d at 880 (noting that primary rule of statutory construction is to give effect to intent of legislature in light of purpose statute was meant to achieve). The purpose behind redevelopment legislation is the alleviation of blight. *See Murray City Redevelopment,* 598 P.2d at 1342. For a redevelopment agency to address the issue of curing blight--which cure may involve a "taking" of private property for public use--the agency must ascertain with specificity whether and to what extent blight exists in a survey area. It is for this reason that the legislature requires a redevelopment agency to make a formal "finding" that blight exists before it develops a plan to cure the blight. Utah Code Ann. § 17A-2-1208(1). The "generic" finding-of-blight requirement that the Commission and the RDA advocate is insufficient to guarantee that the redevelopment process is driven by the desire to cure blight rather than by the desire for the economic development that is promised to follow from a finding of blight or, in other words, that the cart does not precede the horse that is supposed to be pulling it.

[14] Finally, as we recently noted in *Nixon v. Salt Lake City Corp.,* 898 P.2d 265, 268 (Utah 1995), we do not construe a particular section of the Code in the abstract but, rather, in a manner that is harmonious with other closely related code provisions. *See also Schurtz,* 814 P.2d at 1112-13. Section -1208(3)(b) of the 1993 Act provides, "Within 30 days after a *finding of blight,* ... an owner may appeal [that finding] to a court of competent jurisdiction." Utah Code Ann. § 17A-2-1208(3)(b). If we were to adopt the RDA's informal construction of the term "finding of blight" for section -1208(1), we would be required to adopt that same reading for section -1208(3). Under that reading, property owners would never know when to appeal an agency's finding of blight because there would be no requirement that the finding of blight, in the words of the Commission, "be by resolution, that it be reduced to writing, or meet any other formal requirement." (FN7)

[15] Because we cannot give the term "finding of blight" in section -1208(1) the construction the RDA advocates without doing significant damage to the remaining subsections ***731.** of section -1208, *see Curtis v. Harmon Elecs., Inc.,* 575 P.2d 1044, 1046 (Utah 1978) (noting presumption that statutes are not intended to produce undesirable or inequitable consequences), and because the RDA's reading of the term is inconsistent with the intent and purpose of the legislature in adopting the 1993 Act, we conclude that section -1208(1) contemplates a formal, written finding that an area is blighted before a preliminary plan is prepared for that area. Since the RDA did not make a formal, written finding of blight prior to or at the time it prepared the preliminary plan and because "strict compliance with the enabling legislation is required to enact an ordinance setting up a redevelopment plan," *Murray City Redevelopment,* 598 P.2d at 1344, we conclude that the ordinance in question is invalid.

[16] In addition to asking us to invalidate the ordinance creating the Fort Union Redevelopment Plan, Johnson seeks a declaration that she was "wrongfully denied the opportunity for [de novo] trial review of the finding of blight," as provided by section -1208(3) of the 1993 Act. (FN8) Johnson seeks this declaration because she believes that section -1208(3)(b) "is one of the most important of the 1993 amendments to the Act." Our resolution of this issue is governed by our analysis of section -1208(1) set out above.

[17] We hold that Johnson was not entitled to de novo judicial review of the blight finding because the preliminary vote of the Commission on March 8, 1993, which concluded that Johnson's property was blighted, was not a formal "finding of blight" as that term is used in section -1208(3) and, therefore, did not trigger the right to de novo judicial review. The term "finding of blight" both in section -1208(1) and in section -1208(3) means a formal, written finding that an area is blighted. *See Nixon,* 898 P.2d at 269. The RDA and the Commission made a formal, written finding of blight on May 5, 1993, but the finding specifically excluded Johnson's property. Because neither the RDA nor the Commission ever "found" that Johnson's property was blighted within the meaning of the statute, the district court did not err in denying de novo judicial review under section -1208(3)(b).

Because we conclude that the RDA failed to comply with the provisions of section -1208(1) and that the Commission's ordinance adopting the Fort Union Redevelopment Plan is invalid, we reverse and remand to the district court to enter judgment in favor of Johnson in accordance with this opinion.

STEWART, Associate C.J., and HOWE, DURHAM and RUSSON, JJ., concur in ZIMMERMAN, C.J., opinion.

FN1. The RDA is a municipal/county agency composed of the members of the Salt Lake County Commission who sit as the RDA to exercise the powers conferred by statute on redevelopment agencies.

FN2. The legislature promulgated the original version of the Utah Neighborhood Development Act in 1969. Utah Neighborhood Development Act, ch. 5, §§ 1-15, 1969 Utah Laws 1134. We will refer to this version of the statute as the "1969 Act." In 1993, the legislature substantially rewrote the Act. Redevelopment Amendments, ch. 50, §§ 1-48, 1993 Utah Laws 325. We will refer to this version of the statute as the "1993 Act."

FN3. Before the district court, the parties vigorously contested the issue of which version of the Act applied to the Fort Union Redevelopment Plan. Because the district court ruled that the RDA and the Commission had complied with the more stringent requirements of the 1993 Act, it concluded that it did not need to address the issue of which version of the Act applied to Johnson's claims.

FN4. Section 17A-2-1208(3)(b) of the 1993 Act states as follows:

> Within 30 days after a finding of blight under Section 17A-2-1206 or 17A-2-1225, an owner may appeal a finding of blight by an agency or governing body to a court of competent jurisdiction. The court shall review that finding of blight de novo, and the agency shall maintain the burden of proof regarding blight.

FN5. We note that as a "person in interest," Johnson has standing to challenge the legality and regularity of the ordinance under section 17A-2-1226 of the Utah Code, which provides:

> The legislative body by ordinance may adopt the redevelopment plan in its original form or as modified as the official redevelopment plan for the project area. For a period of 60 days after publication of the ordinance adopting the redevelopment plan, any person in interest may contest the regularity, formality or legality of the ordinance. After the 60 day period no person may contest the regularity, formality or legality of the ordinance for any cause whatsoever.
>
> Utah Code Ann. § 17A-2-1226.

FN6. The nonretroactivity clause, depending upon the context of the relevant statutory provision, reads as follows:

> [This section applies to] projects for which a preliminary plan has been prepared after April 1, 1993, and for which any of the following have occurred after July 1, 1993: The completion of the agency blight study, and the good faith commencement of the hearing by the agency under Section 17A-2-1221....
>
> [or]
>
> [This section does not apply to] projects for which a preliminary plan has been prepared prior to April 1, 1993, and for which all of the following have occurred prior to July 1, 1993: The agency blight study has been completed, and a hearing under Section 17A-2-1221 has in good faith been commenced by the agency....
>
> *See, e.g.,* Utah Code Ann. § 17A-2-1207.

***731_** FN7. The Commission seems to recognize this fact in its brief. In its discussion of section -1208(3), the Commission urges this court to hold that "Johnson's action challenging the finding of blight was premature, because it was filed prior to the entry of the [RDA's] and the Commission's [written] Findings of Fact regarding blight." The Commission moves on to argue that its oral finding of blight made on March 8, 1993, was not, in fact, a formal finding of blight, but was more akin to an unsigned minute entry. As such, the Commission argues, the oral finding of blight was not sufficient to trigger the right to de novo judicial review set out in section -1208(3). Curiously, the Commission makes this argument, while at the same time arguing that the finding of blight required by section -1208(1) need only be generic and informal.

FN8. For the text of section -1208(3)(b), see *supra* note 4.

EXHIBIT F

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

ALAYNA J. CULBERTSON, J. BLAINE JOHNSON, EVA C. JOHNSON, AND DIANE PEARL MEIBOS, Plaintiffs,	)	
VS.	)	CASE NO. 940903951 AA
THE BOARD OF COUNTY COMMISSIONERS OF SALT LAKE COUNTY AND COMMISSIONER E. JAMES BRADLEY, COMMISSIONER RANDY HORIUCHI and COMMISSIONER BRENT OVERSON, individually, Defendants.	)	

* * * * *

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Bench Ruling)

BEFORE THE HONORABLE GLENN K. IWASAKI

SALT LAKE CITY, UTAH

MARCH 29, 1995

COMPUTER-AIDED TRANSCRIPTION

A P P E A R A N C E S

FOR THE PLAINTIFF:

NOLAN J. OLSEN
MARTIN N. OLSEN
OLSEN & OLSEN
8138 South State Street
Midvale, UT 84047

FOR THE DEFENDANT:

NICK J. COLESSIDES
466 South 400 East, Suite 100
Salt Lake City, UT 84111-3325

COMPUTER-AIDED TRANSCRIPTION

SALT LAKE CITY, UTAH; MARCH 29, 1995; A. M. SESSION

THE COURT: All right. Thank you, Mr. Olsen.

Both sides have done an excellent job in presenting to me their twist of the matter. My analysis has been over a couple of days, because I have had opportunity to prepare for this hearing and it's sort of like a tennis match: I read one side, I'm on that side. I read the other side, I'm on that side. But I have to look at this in a practical light, that if I denied the motion to dismiss at this time and we proceed further, and in fact I'm incorrect as to the caution of the remedies that Mr. Colessides says, then if the matter proceeds and there is an adverse judgment on behalf of the plaintiffs -- on behalf of defendants, then he's going to prevail on appeal in this matter.

On the other hand, if I were crystal clear and certain that those positions taken by plaintiffs in this matter would overcome any appeal process, I would feel much more comfortable in ruling against the motion for summary judgment and/or judgment on the pleadings.

I have to look at it in the light of the practical aspects of this matter. I think that since both sides have supplemented, somewhat, their memorandum by oral argument, and especially Mr. Colessides, and now referring to the county ordinance, that is why I took the

approximately 45, 50-minute break to allow both sides to, number one, educate the court as well as educate themselves as to the procedures involved here.

While I do recognize, Mr. Olsen, that this is not an appeal, but it appears to me, though the general scheme of administrative remedies, regardless if you call it an appeal or not an appeal, is to allow the County to tend to their own business. To allow the County to have first opportunity to rectify any wrings that there may be, and to follow through before litigation is contemplated in district court.

On the other hand, I do recognize the case of Mason v. State as controlling on the facts as indicated. But it was my distinct recollection as to previous hearing which have been referred to in both memorandum -- if not in yours, Mr. Olsen, that the court ruled adverse to a temporary restraining order on the sole issue -- I think it was in your memorandum -- on the sole issue that I did not find irreparable harm.

The irreparable harm alleged at that time was the inability to have adequate ingress and egress into the property as owned by those property owners surrounded by the 7240 South, the North Union Avenue up until the time it was closed, and I cannot see the north south street designated.

MR. COLESSIDES: It's 10 --

THE COURT: The one to the right of 1035 East, what's that street number?

MR. COLESSIDES: This is this one here. It is the vacation ordinance easement. It does not have a name.

THE COURT: Right.

MR. COLESSIDES: It's that 25-foot easement.

THE COURT: And so in that regard there has been no showing to my satisfaction in anything addition to what I previously ruled on. I further find that the provisions as to 17-27-1001, in addition to the county ordinance, has not been complied with.

What I'm going to do, I'm going to dismiss this matter without prejudice -- without prejudice, that is emphasized -- allowing you to exhaust whatever means you wish to, your administrative remedies, and then have leave, if after that time there has been no resolution to your satisfaction, through the -- through Mr. Jones, through the board of planning -- the Planning Commission, through the Board of County Commissioners and the Board of Adjustment, then you do have leave, without prejudice, to refile the matter.

I also take -- and I would ask that you receive a copy of the transcript in this matter, Mr. Olsen, for those positions taken by Mr. Colessides, in that you are

not going to be prejudiced by any waiver of time.

It is my indication from listening to you, Mr. Colessides, that you're maintaining that it is a continuing problem and that there will be no waiver of time, and your position taken before me today, and I expect that no contrary position be taken in further litigation --

MR. COLESSIDES: That's correct with the exception of the vacation ordinance.

THE COURT: And the vacation ordinance is subject to a previous order that I made.

MR. COLESSIDES: Right. As it relates, your Honor, to enforcement of 1186 and to the conditional use permit, I respectfully submit to the court that so long as there is a continuous development, that is a continuous enforcement problem, and therefore, there is not -- in that sense there is no time limitations.

THE COURT: The reason why I state that, Mr. Olsen, the court is relying somewhat upon Mr. Colessides's position in that matter in rendering the decision, which in my opinion would minimize whatever prejudice, if any, would be to the plaintiffs in this matter.

All I'm asking you to start again, go through the procedures. If at that time you're at the same posture as

you are now, you will have leave to refile. It will not -- it may or may not come to me. I don't know what the computer will spit out. But that would be my ruling as to the -- this would be the judgment on the pleadings based upon the responses and the allegations, and it will be dismissed without prejudice to follow those procedures as I have indicated.

Mr. Colessides, could you draft up the appropriate order.

MR. COLESSIDES: Yes, your Honor. May I have leave of the court to wait until Nora prepares the transcript of these proceedings, your Honor, so that I can use those to have the order?

THE COURT: And please submit it to Mr. Olsen prior to the court's submission so this matter can be moved on.

MR. COLESSIDES: Thank you, your Honor.

THE COURT: Thank you.

REPORTER'S CERTIFICATE

STATE OF UTAH)
: SS.
County of Salt Lake)

I, Nora S. Worthen, do certify that I am a Certified Shorthand Reporter and Official Court Reporter in and for the State of Utah; that as such reporter, I reported the occasion of the proceedings of the above-entitled matter at the aforesaid time and place. That the proceeding was reported by me in stenotype using computer-aided transcription real-time technology consisting of pages 3 through 7 inclusive. That the same constitutes a true and correct transcription of the bench ruling in said proceedings.

That I am not of kin or otherwise associated with any of the parties herein or their counsel, and that I am not interested in the events thereof.

WITNESS my hand at Salt Lake City, Utah, this 3rd day of April, 1995.

Nora S. Worthen, RPR
Utah License No. 22-106373-7801

EXHIBIT G

NICK J COLESSIDES (# 696)
Attorney at Law
466 South 400 East, Suite 100
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Tele: (801) 521-4441

Attorney for defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ALAYNA J. CULBERTSON, J. BLAINE JOHNSON, EVA C. JOHNSON, and DIANE PEARL MEIBOS, Plaintiffs, vs. THE BOARD OF COUNTY COMMISSIONERS OF SALT LAKE COUNTY, and COMMISSIONER E. JAMES BRADLEY, COMMISSIONER RANDY HORIUCHI and COMMISSIONER BRENT OVERSON, individually, Defendants.	ORDER Case No.: 94 09 03951 Judge: Glenn K. Iwasaki

Defendants' motion for judgment on the pleadings or in the alternative motion for summary judgment having come regularly for hearing, pursuant to notice, on the 29th day of March, 1995, before the Honorable Glenn K. Iwasaki, Judge, presiding, plaintiffs being represented by Martin N. Olsen, their attorney of record, and defendants being represented by

Nick J. Colessides, their attorney of record, and the Court having reviewed the various motions, memoranda, and accompanying affidavits submitted in behalf of all parties, and the Court having heard argument by both counsel on behalf of all parties, and the matter having been submitted to the Court for a decision, and good cause otherwise appearing therefor, now upon motion of Nick J. Colessides attorney for defendants,

IT IS HEREBY ORDERED, DECREED, AND ADJUDGED that plaintiffs' claims as contained within plaintiffs' second amended complaint, relating to that certain Salt Lake County Ordinance as passed by the Board of Salt Lake County Commissioners, to-wit, ordinance number 1275 (corrected), dated August 10, 1995, and recorded August 12, 1995, in the records of the Salt Lake County Recorder's Office, be and the same are hereby dismissed with prejudice; and

FURTHER, ORDERED that plaintiffs' all other claims as asserted against defendants in plaintiffs' second amended complaint be dismissed without prejudice; and

FURTHER, ORDERED that plaintiffs' second amended complaint be and the same is hereby dismissed without prejudice.

Dated this 14th day of April, 1995.

GLENN K. IWASAKI
District Court Judge

APPROVED AS TO FORM AND SUBSTANCE:

MARTIN N. OLSEN
Attorney for plaintiffs

CERTIFICATE OF SERVICE

Served a copy of the foregoing to:

MR MARTIN OLSEN ESQ
ATTORNEY AT LAW
OLSEN & OLSEN
8138 SOUTH STATE STREET
MIDVALE UTAH 84047

MR KENT LEWIS ESQ
ATTORNEY AT LAW
SALT LAKE COUNTY ATTORNEY'S OFFICE
2001 SOUTH STATE STREET # S 3600
SALT LAKE CITY UTAH 84190-1200

by mailing the same, first class mail, postage prepaid, this 1st day of April, 1995.

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EXHIBIT H

Exhibit "E"

Date: WEDNESDAY MAY 25TH, A.D., 1994

THIS BEING THE TIME HERETOFORE SCHEDULED for a public hearing for Application #PL-94-7001 - Hermes Associates in regard to a street vacation, 1035 East North Union Avenue (7310 South), C-2 & R-2-10 zones/Union.

Mr. Bill Marsh, Development Services Section Manager, stated that this is an item being considered for a street vacation. The application was submitted to the Planning Commission requesting a vacation of certain streets in the Union Fort area - the vacation of the streets would help accommodate the

expansion of the Family Center. As they look at the aerial photograph, he pointed out several key points - the canal, boundary of existing Family Center, Union Park Avenue (1300 East), South Union Avenue, North Union Avenue where they access to 1300 East and 1000 East. The areas outlined in the red, yellow and green are the areas to be vacated and some of them have roads on them now, some of them would be partial vacations of existing right-of-ways, some are areas that don't have roads on them now, but should be included in the vacation. There are some areas in a public right-of-way that have structures located on them - 1000 East (map) there is a home that appears to be located within the right-of-way. The Planning Commission reviewed this application on March 22, 1994, approving the request to vacate the streets and recommending the County Commission vacate those streets.

Commissioner Overson reminded the Commission that this hearing was held once before (April 25, 1994) and the only thing that was flawed was the notice to the most impacted property owner, who is present today.

Mr. Marsh indicated that they double checked the list and made sure that the property owner-of-record was notified and that the relative that had interest was also notified.

Mr. Reese Jensen, Hermes Associates, stated that this is a redo of what occurred on the 25th of April and is being redone this evening to correct the technical flaw of insufficient notice. He has in his hand a copy of a document dated February 28, 1994, which was executed by Chairman Bradley on behalf of the Redevelopment Agency of Salt Lake County and he made a brief quote from Attachment #5 to this document, page 57 which is the agencies undertakings and further on page 70 *"upon petition of the developer, the agency will seek to have the county commence the statutory vacation process of the public streets, roads and public right-of-ways no longer needed as part of the development on the site as shown and described in Attachment 9."* He would simply observe that they are eager to move forward and has in his hand a copy of the document that has been prepared by Mr. Nick Colessides, Attorney for Hermes, granting a non-exclusive easement to Eva C. Johnson to provide continuing access to the property and that has been discussed with Mr. Kent Lewis of the County Attorney's office and they have Mr. Richard Miller who has prepared the technical work and has interacted with Brent Tidwell, Development Engineering Administrator. All of the proper documentation is in place and they are here to request that what happened on the 25th will repeated this evening in approval.

Commissioner Bradley stated that for the record, he may have executed that document, but he voted against it.

Mr. Nolan Olsen, Olsen & Olsen, Attorney, stated that he sent the Commissioners a letter dated the 12th day of May, 1994, referring to some case law. There isn't any question in his mind that if they vacate this road, they probably have a right to do so, but if they vacate it, his client's property goes to the middle of the road. Under the Mason vs. State case, if they vacate it they need to give his client to the middle of the road. His clients are Eva Johnson and Eleana Gulbertson, Mr. Croxford is dead, and they own the .91 of an acre on North Union Avenue. When the county vacates this property, they have a provision that walls them in on the north side or south side of North Union Avenue. How can they be walled in when the law says they get the property if vacated - it has to go to the abutting land owner. They can't be walled in on the north side of North Union Avenue, if they are going to be walled in, they have to be walled in in the middle of the road - that's the law. He has furnished this to the County Attorney's office. They have to give them reasonable access - the Mason case specifically provides that they not only have to give them reasonable access, egress and ingress, but they have to be on a public access. What they heard Mr. Jensen just say was that they were going to give them an easement across their property - the county is going to give this road to Hermes. The county can't give this road to Hermes, if they are going to do anything, it has to give this road to his clients to the middle of the road. They have to provide them access to a public road, not across Hermes property, but public access - that's the law. If they vacate this road tonight and they tell Hermes to go in and start digging that road up, his people have no way to get to their property. If the county does anything, he would expect this Commission to have at least enough courtesy to hold that off for a ten-day period until they can get a court hearing to determine if this Commission can vacate this road, can give that property to Hermes, or do they have to give it to his clients - that's the law. He doesn't think the county really cares at this point-on-time because the county has a contract with Hermes that says that Hermes is going to take all of the responsibility of lawsuits against this County Commission, but basically how does this Commission look in relation to this, they lose two to one on every vote, but how does this Commiscion look if in fact they vacate this road and say that Hermes gets it, what is Hermes paying for it. Nothing. There is some law that say they have to pay if they vacate, but it also specifically provides that the abutting landowner gets to the middle of the road and his clients description goes to the middle of the road - they can't vacate

that property and have Hermes put a wall up on the north side or south side of North Union Avenue and then say that they can come onto Hermes property to try and get out of their property, that isn't proper. He doesn't expect a favorable vote from this Commission, but he does expect this Commission to give them some time to get an injunction against this Commission to vacate this road.

Commissioner Horiuchi asked Mr. Kent Lewis, Deputy County Attorney, if he would respond to this matter. It is his understanding that only part of this road will be vacated, but any portion there is reimbursement back to the county for that matter as he understands it.

Mr. Olsen indicated that the whole road was going to be vacated.

Mr. Lewis stated that it is their recommendation that the portion in front of Croxfords not be vacated, but permanently closed, at least twenty-five feet, and then the easements be granted to both Hermes and the Croxfords, so it won't go as a matter of law to the abutting property owners - it will still remain in the public domain, but an easement be granted across it. Mr. Olsen is correct in stating that under the law when a public road is vacated they have to provide reasonable alternative access to the property and that is the issue this Commission has to decide as to whether that is reasonable alternative access. Obviously, they say it isn't and Hermes believes that it is, so that is what their decision is.

Commissioner Bradley asked him to say that again.

Mr. Lewis stated that when they close a public road and it is one they have a right to use, they have a private easement across that still, unless reasonable alternative access is provided. The issue for them to decide is whether the alternative access still gives them reasonable access to their property.

Commissioner Bradley asked what the benefit is in leaving one-half of it in the public domain.

Mr. Lewis stated that if they vacate it, as a matter of law, it goes equally to the abutting owners, even without any conveyances. If they vacate it, half of it would go to Hermes and half to the Croxfords - if they keep it in public ownership, the public interest and the public ownership, but close it, then they could convey easements so both of them could have access to their properties across that twenty-five feet and that is what the recommendation would be to avoid the problem of the title transferring automatically to both property owners.

Commissioner Bradley asked who determines that easement.

Mr. Lewis stated that they do, this is their decision (he wasn't sure what Commissioner Bradley meant).

Commissioner Bradley stated that if they vacate the road, who determines - there is an access?

Commissioner Overson indicated that they weren't vacating the road. If they follow the recommendation, they won't have the problem alleged by Mr. Olsen. There is an access.

Mr. Lewis stated that they were vacating the road, except for this one piece if they do what is recommended to solve this problem. From his understanding, Hermes is going to grant access from a public road to their road and the issue for them to decide is if this is a reasonable alternative access.

Commissioner Bradley asked Mr. Marsh is he could show them on the map - he wanted to know if they have seen the proposed access (yes).

Mr. Marsh located the Croxford property and stated that as they look at the plat the public street looks like it is paved to here and looks like a dirt road up to that point from that small ditch going east that has been formally vacated. The proposal for the access would be that they would come up this public right-of-way (map) and Hermes would provide a right-of-way up the side of their property and across the front of the vacated road. There are two structures on the Croxford property - one is located there (map) and the other is there - those driveways currently come out to the north, so access would be up the public street, up the right-of-way, across the front of the property so they could access those two homes.

Commissioner Bradley asked if there was a more appropriate right-of-way being proposed.

Commissioner Overson asked by whom.

Commissioner Bradley stated by anyone.

Commissioner Overson stated that this is the one being proposed by their staff and attorney - there isn't any other alterative proposal before them.

Mr. Nick Colessides stated that he would like to address the issue of access. They will note that presently the Croxford or Johnson property has access on two fronts - the south and north part. The county is being asked to vacate the north portion of the street and also to leave in the public domain, part of that portion. By Hermes giving a twenty-five foot easement on the west side of the street, as Mr. Graham pointed out earlier, the property now has access on three places - north, south and west. The issue raised by Mr. Olsen of the money has been addressed - the issue of consideration has been raised in the RDA/Hermes agreement and they will note that the appropriate department, Real Estate through Roger Hillam, is ascertaining the cost of this particular vacation of road and will be dealt with in accordance with that agreement. By asking the Commission to do exactly what it is being asked to do, that is to vacate that portion of the road except twenty-five feet directly north of the Croxford property and by allowing Hermes to give them the access of twenty-five feet on the west side, they will have proper access to their property and at the same time, the issue of consideration will be resolved in accordance with the agreement. They are meeting all of the obligations, both the spirit and intent, of what is being asked to be done here.

Mr. Robert Hale, a resident of the area, stated that the access that appears on the last drawing he saw was that this twenty-five easement was immediately adjacent to a loading dock, a loading entrance. There is no other docks space for the two proposed buildings that are going to go in right there (map) and that this would serve as their loading dock. They would, perhaps, have to share this easement with semi-trucks, piggy-backs or whatever else is going in there and this doesn't sound proper.

Commissioner Bradley asked if this was correct.

Mr. Reese Jensen showed them the plat and the access (couldn't hear what was being said).

Mr. Hale stated that the reason this project isn't moving forward is that it isn't being done right or well. It wasn't the right use for the property for all concerned. He thinks that Hermes is very protective of their property rights - if they are relying on access into the Croxfords through an easement, there may be future problems for those that have to use that easement. He, for one, was confronted by the managing owner of Hermes Associates and asked to leave their property while he was on a public access area, on a sidewalk, collecting petitions for a referendum. He has a feeling that should there be other problems of discord, of rights-of-use, that an easement could be withdrawn by Hermes, as well as they have previously confronted those on a public access parts of their property.

Commissioner Overson stated that the easement comes from the county, not Hermes.

Commissioner Horiuchi stated that if they grant it in perpetuity, he suspects that it would only be the county that could remove it - Hermes couldn't.

Mr. Colessides stated that it would be a permanent easement that goes with the property and cannot be withdrawn.

Mr. Hale stated that this road is used by thousands of vehicles every day, it is a vital use in their community - the traffic patterns have been well documented and it is a heavily used road. Neighbors use it every day and the access to this neighbors property is seriously harmed, the safety and location of the home would be seriously jeopardized. How could they find 1020 East North Union Avenue with a wall and three stores around it if there should be a fire or emergency needs - he seriously questions whether that house could be located in the needs that would be there. Water rights along this road needs to be protected and they need to address that issue. The Union Ditch leaves Little Cottonwood Creek, comes through this property, along the back side of this road that is going to be proposed to be the access for the Croxford property and they need to make sure that water rights are maintained through that property.

Mr. Olsen stated that they have a petition to vacate a road, that is what is before this Commission and now they are changing it in the middle of the stream and saying that they aren't going to vacate that road, etc. He is telling them that they are going to vacate that road and vote on vacating that road or else they are going to bring it up, republish and do it over again. If they vacate the road, they get half of it, that is the law. Give them their half of the road, that's fine, go ahead and vacate it, give Hermes the one-half and them the other half, but they can't do both. If they want to change it, republish.

Commissioner Bradley asked Mr. Lewis for a ruling. It is posted as a vacation.

Commissioner Horiuchi stated that obviously within zoning situations they modify zoning issues at will, conditional uses within the scope of their responsibility and authority. If they decided, for example, not to grant anything tonight, that might be contrary to the issue and they would have to re-notice that they were saying no.

Mr. Lewis stated that if they don't vacate it, they are under no obligation, but to close it, it is more or less a lesser remedy. The petition is to vacate and they can vacate or not vacate, they can do something less.

Commissioner Overson asked if they could vacate part and not the rest of it.

Mr. Lewis stated that this is what they are being proposed to do - to vacate all of it except for this portion, but to close that portion, which is less than vacating it. They can litigate that as to whether they have to start over to close it, rather than vacate it, but he thinks it is a lesser included.

Commissioner Overson stated that it sounds to him that all of the attorney's are making their preliminary arguments for a court case and he moves that they close the public hearing and move forward with this.

Mr. Allan Moll, Deputy County Attorney, stated that they will note that all of the agenda says is street vacation and that is generic enough to support what Mr. Lewis is suggesting.

Mr. Reed Boggess stated that there are two streets, Middle Lane and North Lane, with North Lane becoming North Union Avenue and Middle Lane is the one they are talking about that is south of the Croxford property. Approximately twenty years ago Joe Overt sold his house/property to Hermes, the canal was moved over and Harmons built. Everyone in the Fort area agreed to sell to Hermes, except for Croxford and if they don't want to sell, they don't need to sell, but everyone else did and he has talked to many who have moved and they are enjoying their new location. He bets that this will be worked out and they will have a beautiful project there.

Commissioner Bradley closed the hearing at this time.

Commissioner Horiuchi made a motion to vacate the streets as requested in the petition which will include the streets within the platted description and as they are located on the ground, except for a twenty-five wide segment of street abutting the Croxford/Johnson property on North Union Avenue. They will permanently close, but not vacate that section of the street as a public street and convey access easements across it to the Croxfords and Hermes. This decision is subject to the Engineer's and Attorney's Offices working out legal descriptions in the form of the ordinance and that they direct staff, Mr. Marsh and members of the Development Services staff, to work out a restriction on the kinds of vehicles that can access that basic easement (the idea being that semis shouldn't be there and other similar type vehicles). They can do this since they will have basically, ownership remaining in the public domain, they will be able to control that and this type of control mechanism should be worked out within the staff with consideration being made to the Croxfords so they don't have those type of semis or giant vehicles intruding on their lives.

Mr. Marsh stated that there was one other thing they should consider. There are some utility easements that may need to be accommodated, so those need to be worked out.

Commissioner Horiuchi asked that they work these out the utility easements as well as a staff - this is him motion.

Commissioner Bradley called for a vote on the motion - vacate the streets as requested in the petition which will include the streets within the platted description and as they are located on the ground, except for a twenty-five wide segment of street abutting the Croxford/Johnson property on North Union Avenue. They will permanently close, but not vacate that section of the street as a public street and convey access easements across it to the Croxfords and Hermes. This decision is subject to the Engineer's and Attorney's Offices working out legal descriptions in the form of the ordinance and that they direct staff, Mr. Marsh and members of the Development Services staff, to work out a restriction on the kinds of vehicles that can access that basic easement (the idea being that semis shouldn't be there and other similar type vehicles), and that they work out the utility easements as well as a staff, authorizing evelopment Services and the County Attorney to effect same, whereupon roll was called and showed the vote to be: Commissioner Bradley "Nay," Commissioner Horiuchi "Aye" and Commissioner Overson "Aye."

EXHIBIT J

Boyd NELSON, Lorraine Nelson, Steven Whitlock, and Sheila Whitlock, Plaintiffs and Appellants,

v.

PROVO CITY, a municipal corporation, Defendant and Appellee.

No. 930227-CA.

Court of Appeals of Utah.

March 23, 1994.

Following city's purported vacation of roadway, abutting landowners brought suit seeking to establish their reversionary interests to middle of road. City counterclaimed for quiet title to roadway. The Fourth District Court, Utah County, George E. Ballif, J., entered final judgment awarding legal and equitable title of roadway to city, and abutting landowners appealed. The Court of Appeals, Davis, J., held that: (1) city did not acquire fee simple title to dedicated roadway by virtue of Federal Townsite Act, but held roadway only in trust, with corresponding fiduciary duties to collective occupants of city, and (2) city did not properly vacate roadway, even assuming that it could do so in its capacity as trustee.

Reversed and remanded

1. Dedication ⇐53

City did not acquire fee simple title to dedicated roadway by virtue of Federal Townsite Act, and could not acquire such title unless it reserved roadway for public use by obtaining a deed until such time city held roadway in trust only, with corresponding fiduciary duties to occupants of town U C A 1953, 57-7-8, 57-7-17, 43 U.S C.(1970 Ed) § 718

2. Municipal Corporations ⇐657(7)

Even assuming that city could properly vacate roadway which it held only in trust for occupants of city, any interest that city held after vacating roadway would still be held in trust, and not in absolute ownership.

3. Municipal Corporations ⇐657(7)

When municipality has but a determinable fee and does not own underlying fee simple to roadway, vacation of roadway results in fee reverting to abutting landowners.

4. Municipal Corporations ⇐657(7)

When municipality owns underlying fee to roadway, proper vacation of roadway would not change municipality's right to underlying fee.

5. Municipal Corporations ⇐657(5)

Roadway was not properly vacated, where city failed to notify abutting landowners, or to notify its citizens generally pursuant to statute until after purported vacation. U.C.A.1953, 10-8-8.4.

James G. Clark (argued), Provo, for appellants.

Gary Gregerson, Provo City Atty., and David Dixon, Asst. City Atty. (argued), Provo, for appellee.

Before BENCH, BILLINGS and DAVIS, JJ.

OPINION

DAVIS, Judge:

Appellants (Landowners) appeal a final judgment concluding that appellee Provo City (City) holds legal and equitable title (fee simple) to the portion of 900 South between 100 East and University Avenue (Roadway) abutting Landowners property We reverse and remand

Pursuant to the Federal Townsite Act of 1869 the federal government deeded the Roadway along with the abutting lands in trust to the local municipal authority, Provo Mayor Abraham O Smoot, as trustee (the Townsite Conveyance) The Roadway existed as a public thoroughfare prior to this conveyance The parties do not dispute that Landowners' predecessors in interest did not occupy the Roadway or the abutting property at the time of the Townsite Conveyance. Nor do they dispute that the metes and bounds of each subsequent conveyance ran to

the Roadway but did not specifically exclude it.

In 1871, Smoot deeded land north of the Roadway to James Dunn, who in 1876 deeded the parcel to Peter Stubbs. In 1982, a portion of the Stubbs parcel was deeded to appellants Stephen Whitlock and Sheila Whitlock. In 1985, Stephen Whitlock alone received another portion of the Stubbs parcel. Finally, in 1991, appellants Boyd Nelson and Lorraine Nelson received a deed for another portion of the Stubbs parcel.

In 1875, Smoot deeded land south of the Roadway to John P.R. Johnson, as trustee of the First Ward Pasture Company. In 1927, First Ward Pasture Company deeded its parcel to City. 900 South continued to be used as a public roadway.

In its regularly scheduled meeting of August 22, 1989, the Provo Municipal Council passed ordinance number 0–89–055, which purported to vacate and set aside the Roadway. After passing the ordinance, City published notice one time in the Provo Daily Herald on August 31, 1989. City mailed no notice of the vacation to the abutting landowners either before or after the fact. City then rerouted a portion of 900 South onto the property it owned to the south of the original route and sold the vacated portion of the original route to a commercial developer. The vacation of the Roadway landlocked one lot and deprived two other lots of access to 900 South.

Landowners sued City claiming a reversionary interest in the Roadway from their property lines to the middle of the Roadway. They sought compensation and, in the alternative, the setting aside of the vacation. City counterclaimed for quiet title to the Roadway.

On July 6, 1992, the trial court quieted title in City as against Landowners, concluding that City held fee simple title since the time of the Townsite Conveyance. Landowners moved for specific findings regarding City's compliance with the Townsite Act and with the State Township Act. The trial court denied the motion. Landowners appeal.

CITY'S INTEREST IN ROADWAY

Landowners claim the court erred in concluding the Townsite Conveyance conveyed a fee simple interest to City because (1) the patent, when read in context of the Townsite Act, conveyed the Roadway to City in trust only, and (2) City failed to reserve the Roadway for public use pursuant to Utah Code Ann. § 57–7–8 or –17 (1990).

United States Patent

[1] In 1867, the United States Congress passed the Townsite Act, also known as "An Act of Congress for the Relief of the Inhabitants of the Cities and Towns upon Public Lands." Federal Townsite Act, ch. 177, 14 Stat. 541 (1867), codified as 43 U.S.C. § 718, repealed by P.L. 94–579, Title VII, § 703(a), 90 Stat. 2789 (1973). This act enabled town corporate authorities, as trustees, to acquire federally-owned property for their towns. The property was acquired

> in trust for the several use and benefit and use of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

Id.

The Townsite Act limited townsite lands to those "actually occupied by the town and the title to which is in the United States." *Id.* The Townsite Act provided that the local legislative authority could make regulations for the disposition of the townsite lands. *Id.* However, "any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void." *Id. See Hall v. North Ogden City,* 109 Utah 325, 175 P.2d 703, 705 (1946).

Conveyances pursuant to the Townsite Act transferred title to town authorities in trust for the collective occupants. Conversely, town authorities could not hold the land as purchasers.[1]

The Utah Supreme Court interpreted the Townsite Act to mean that conveyances

1. The following exchange between senators illustrates the intent of the Townsite Act that town

thereunder served to transfer equitable ownership of a parcel of land to an occupant only if the parcel was occupied at the time of transfer. *Hall*, 175 P.2d at 705. *Hall* does not address the issue before us: whether a municipality has fee simple to a dedicated roadway where the abutting land was unoccupied at the time the town acquired it.[2] Still, the language of the Townsite Act is clear that conveyances thereunder served to transfer land in trust to the municipality as trustee and not as absolute owner.

Disposing Legislation

Landowners claim that City could not acquire title to 900 South under the patent unless Smoot reserved the street for public use by obtaining a deed. We agree.

The Townsite Act provided that the local legislative authority could make regulations for the disposition of the townsite lands and "any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void." 43 U.S.C. § 718. Utah's disposing legislation is found in Utah Code Ann. § 57-7-1 to -19 (1990).

Section 57-7-17 of the current code, and all predecessor statutes, provides as follows:

> Lots or parcels of land necessary for streets ... may be reserved by the city commissioners, the mayor, the president of the board of trustees or the district judge, as the case may be; and he [or she] may execute and deliver to the proper party a deed for any property set aside for such purposes.

Section 57-7-8 provides:

> If a city commissioner or the mayor of any city or the president of the board of trustees of any town shall be a claimant of lands in such city or town, the recorder or the clerk thereof, as the case may be, shall, upon the certificate of the district court made as in the case of other claimants, execute a deed of conveyance to such claimant for the lands finally adjudged to him [or her] by the court.

In short, the Townsite Act, along with the state's disposing legislation, provide that a townsite conveyance transferred land to a municipality in trust. In order for the municipality to own the land for itself, it, like any other claimant, would have to obtain a deed.

Here, the parties agree that City never explicitly reserved the Roadway or obtained a deed to the Roadway pursuant to section 57-7-8 or -17. Thus, City remains holder of the Roadway in trust. City purported to vacate the Roadway as absolute owner, without regard to its responsibilities as trustee or the provisions of Title 57. Accordingly, we remand this matter to the trial court to consider City's role as trustee of the Roadway, with its attendant fiduciary duties to the beneficiaries, in this case, the collective occupants of the town. *See* 43 U.S.C. § 718.

authorities could not purchase the land, but must hold it in trust for the collective occupants:

> Mr. Howard: Does the Senator from California mean to be understood that this bill provides that the corporate authorities of the town may become the purchasers? Is that the scheme here?
> Mr. Conness: No, sir.
> Mr. Howard: I so understood him.
> Mr. Conness: They simply enter the land as agents in trust for the occupants, those in possession.
> Mr. Howard: Do they get a title?
> Mr. Conness: A title for the occupants from the United States.
> Mr. Howard: Then they become the owners in trust.
> Mr. Conness: In trust. That is it exactly.

Congressional Globe, 39th Cong., 2nd Sess. 1109 (1867).

2. City cites *Loeber v. Butte General Electric*, 16 Mont. 1, 39 P. 912 (1895) for the proposition that the municipality holds fee simple title as absolute owner to a street derived from a townsite conveyance. In *Loeber*, the disputed alley had been included in the original townsite survey and the abutting land had been occupied at the time of the townsite transfer. The issue of whether the municipality held the alley in fee simple or as a determinable fee was not before the court. The court held that because the alley in question had been dedicated to public use before the conveyance of the lot, the abutting landowner "was not the owner in fee of the alley" and thus the abutting landowner could not complain of the installation of electric poles in the alley. *Id.* 39 P. at 913. This holding is not helpful to resolution of this case because it does not resolve whether the municipality held a determinable fee or an absolute fee in the alley. The municipality in *Loeber* needed only to have held a determinable fee or even an easement to permit installation of the electric poles.

DETERMINABLE FEE

[2] Landowners claim the trial court erred in failing to conclude that upon vacation of the Roadway, the fee to the center line of the Roadway would revert to them as abutting property owners.

[3, 4] Utah case law relies on common law to support the theory that where a municipality has but a determinable fee[3] and does not own the underlying fee simple, the vacating of the roadway results in the fee reverting to the abutting landowners. *Sears*, 572 P.2d at 1363; *White v. Salt Lake City*, 121 Utah 134, 239 P.2d 210, 213 (1952); *Falula Farms*, 866 P.2d at 571. *See also* Utah Code Ann. § 10–8–8.5 (Supp.1993) (vacating of public roadway dedicated to public use by proprietor terminates city's determinable fee therein). Conversely, where a municipality owns the underlying fee to a roadway, proper vacation of such would not change the municipality's right to the underlying fee. *Sears*, 572 P.2d at 1363.

While City may hold the Roadway in fee simple, that interest is held in trust. Thus, even if City as trustee had (or could have) properly vacated the Roadway, City's interest would still be held in trust and not in absolute ownership. This brings us to whether or not City properly vacated the Roadway.

NOTICE TO VACATE

[5] Landowners claim City did not properly vacate the Roadway because it did not provide proper statutory notice to abutting landowners and City's other occupants.

A municipality may not vacate a street unless it has provided proper notice pursuant to Utah Code Ann. § 10–8–8.4 (1992). Notice is given "by publishing in a newspaper published or of general circulation in such city once a week for four consecutive weeks preceding action on such petition or intention ... and by mailing such notice to all owners of record of land abutting the street or alley proposed to be vacated...." *Id. See also Ercanbrack v. Judd*, 524 P.2d 595, 597 (Utah 1974) (purported vacation of roadway nullity where no notice given to abutting landowners or general public); *Boskovich v. Midvale City Corp.*, 121 Utah 445, 243 P.2d 435, 437 (1952) (improper vacation of street and alley denied abutting landowners due process); *Tooele City v. Elkington*, 100 Utah 485, 116 P.2d 406, 407, 410 (Utah 1941) (mayor could not quitclaim alley by resolution to abutting land owner in contravention of vacation statute even where land had been deeded to city by federal government).

Here, City did not notify abutting landowners, nor did it notify its citizens generally pursuant to statute. In fact, the single published notice ran after the purported vacation. Thus, City's notice was not only insufficient, it was untimely. As a result, any purported vacation of the Roadway is a nullity. *See Boskovich*, 243 P.2d at 437. We therefore reverse the court's conclusion that City properly vacated the Roadway and remand for further proceedings consistent with this opinion.

CONCLUSION

We (1) hold that the Townsite Act conveyed the Roadway to City in trust only; (2) hold that City never explicitly reserved the Roadway or obtained a deed to the Roadway pursuant to statute; (3) remand for consideration of City's role as trustee of the Roadway, with its attendant fiduciary duties to the beneficiaries; and (4) reverse the court's determination that City properly vacated the Roadway.

BENCH and BILLINGS, JJ., concur.

3. A fee simple determinable expires automatically on the occurrence of a stated event. *See* Black's Law Dictionary 615–16 (6th ed. 1990). Thus, where a municipality has a determinable fee in a roadway, common law provides that the limited fee ends when the roadway is vacated. *See Falula Farms v. Ludlow*, 866 P.2d 569, 571 (Utah App.1993). Unlike the situation here a municipality typically obtains a determinable fee in roadways when the same are accepted thereby pursuant to the final approval of a subdivision plat. That was the case in *Sears v. Ogden*, 572 P.2d 1359, 1363 (Utah 1977). Here, we determine that whether City's interest was that of a determinable fee or a fee simple, the interest was held only in trust.

EXHIBIT K

Salt Lake County
Board of Commissioners

Jim Bradley CHAIRMAN
Randy Horiuchi
Brent Overson

SALT LAKE COUNTY

SALT LAKE COUNTY
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Utah 84190-1000
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Fax (801) 468-3535

92-2108
PL-94-7001

July 13, 1994

Ms. Katie L. Dixon
County Recorder
Government Center, North Bldg.
Salt Lake City, Utah

Dear Ms. Dixon:

The Board of County Commissioners, at its meeting held this day, approved the attached **Ordinance #1270 - Vacation & Closure for North Union Avenue/1035 East and 1115 East.**

Said ordinance reflects action taken by the Commissioners on May 25, 1994. The 25' easement to the south of the Croxford property between 2240 South and the closed portion of North Union Avenue will be a public right-of-way. It is the county's responsibility to maintain the public right-of-way unless a maintenance agreement is worked out with Hermes. Title to the land within the vacated roads will revert as a matter of law to the abutting property owner (Hermes) upon enactment of this ordinance. Compensation for the interest of the county in the streets is being worked out between Hermes and the real estate office.

The ordinance has been published in a newspaper of general circulation.

Pursuant to the above, you are hereby directed to place same on record for no fee and return the recorded document to the Commission Clerk.

Very truly yours,

BOARD OF COUNTY COMMISSIONERS

SHERRIE SWENSEN, COUNTY CLERK

by Isabelle U Vasquez
Deputy Clerk

hfp
cc: Attorney/Kent Lewis
Real Estate/Roger Hillam
Public Works/Lonnie Johnson
Development Serv/Bill Marsh
Newspaper
encl.

ORDINANCE NO. 1270 DATE July 13, 1994

AN ORDINANCE VACATING PORTIONS OF NORTH UNION AVENUE, 1035 EAST AND 1115 EAST, AND PERMANENTLY CLOSING A PORTION OF NORTH UNION AVENUE, ALL WITHIN THE UNION FORT PLAT.

The Board of County Commissioners of Salt Lake County ordains as follows:

SECTION I. Vacation and Closure Ordinance No. 1270 is enacted as follows:

1. The following segments of North Union Avenue, 1035 East and 1115 East, within the Union Fort Plat, a subdivision recorded on January 13, 1857 in the Salt Lake County Recorder's Office, are hereby vacated:

> Beginning at the southeast corner of Lot 1, Block 9, Union Fort Plat, a subdivision recorded 13 January 1857 in the office of the Salt Lake County Recorder, and running thence North 17° East 12 rods; thence North 73° West 10 rods, more or less, to a point South 17° West 2 rods from the southwest corner of Lot 9, Block 12, Union Fort Plat; thence North 17° East 2 rods to said southwest corner of Lot 9, Block 12; thence South 73° East 32.5 rods to the southeast corner of Lot 1, said Block 12; thence South 17° West 2 rods, more or less, to the old fort wall; thence South 73° East 15.41 rods, more or less, to a point North 25° East 15 feet, more or less, from the northeast corner of Lot 23, Block 10, said Union Fort Plat; thence South 25° West 15 feet, more or less, to said northeast corner of Lot 23; thence North 73° West 33 rods to the northwest corner of Lot 13, said Block 10; thence South 17° West 12 rods to the southwest corner of Lot 12, said Block 10; thence South 73° East 40.91 rods, more or less, to the southwest corner of Lot 3, Block 11, said Union Fort Plat; thence South 17° West 13 rods to the southwest corner of Lot 6, Block 6, said Union Fort Plat; thence South 73° East 25.5 rods to the southeast corner of Lot 1, said Block 6; thence South 31°48′ West 19.45 feet along the west line of 1300 East Street; thence North

73° West 30.11 rods, more or less, to a point South 17° West 0.14 rods, more or less, from the southeast corner of Lot 1, Block 7, said Union Fort Plat; thence North 17° East 12.14 rods, more or less, to the northeast corner of Lot 24, said Block 7; thence North 73° West 6 rods to the northeast corner of Lot 22, said Block 7; thence North 17° East 25 feet; thence North 73° West 12 rods; thence South 17° West 25 feet to the northwest corner of Lot 19, said Block 7; thence North 73° West 18 rods to the northwest corner of Lot 13, said Block 7; thence South 17° West 12 rods to the southwest corner of Lot 12, said Block 7; thence North 73° West 15 feet, more or less, to the old fort wall and the East line of 1035 East Street; thence North 17° East 15 rods, along said wall and said East line of 1035 East Street; thence North 73° West 4 rods to the point of beginning. Contains 2.01 acres, more or less, as described.

2. The following segment of North Union Avenue within the Union Fort Plat is hereby permanently closed:

Beginning at the southwest corner of Lot 6, Block 7, Union Fort Plat, a subdivision recorded 13 January 1857 in the office of the Salt Lake County Recorder and running thence North 17° East 12 rods to the northwest corner of Lot 19, said Block 7; thence North 17° East 25 feet; thence North 73° West 25 feet; thence South 17° West 223 feet to the South line of said Block 7; thence South 73° East 25 feet to the point of beginning. Contains: 0.128 acres.

3. That the segment of North Union Avenue described in paragraph 2 is being closed rather than vacated in order that Salt Lake County may convey an access easement over said property to Hermes Associates Ltd., the adjacent property owner on the north, and to the owners of lots 3, 4, 5, 6, 19, 20, 21, and 22, Fort Union Plat, the adjacent property owners on the south ("south

property owners"), which will allow better access to their respective properties than by having the property revert as a matter of law, half to each by vacation; that the south property owners will still have direct access to 7240 South and will be provided additional access to the north side of the properties from 7240 South through a 25 foot wide public right-of-way which will be conveyed by Hermes Associates Ltd. to Salt Lake County. The 25 foot public right-of-way will revert to Hermes Associates, Inc. in the event it acquires the south properties.

4. The segments of the described streets being vacated include any additional area within the streets as they exist on the ground except as to the segment of North Union Avenue described in paragraph 2, which is being closed rather than vacated.

5. This ordinance is based upon a finding by the Board of County Commissioners that due and proper notice of the hearing to vacate the particular portions of said public highways was duly given according to law; that the segments of said public highways being vacated and the segment being closed are not needed as a public highway or a public right-of-way; that the vacation and closure will not be detrimental to the interest of Salt Lake County or to the general public; that neither the public nor any person will be materially injured thereby and that the vacation and closure of said highways accordingly is appropriate and should be done.

6. All right, title and interest in and to the said portion of said public highways being vacated is to revert by operation of law to the abutting property owners or owners.

7. The Salt Lake County Recorder is hereby directed to record this ordinance and make the necessary changes on the official plats and records of the County to reflect the same.

8. This ordinance shall have no force or effect upon any easement or right-of-way for public utilities, holders of existing public franchises, water drainage easements, pipeline easements or other uses as presently exist under, over or upon the vacated portion of said public highways or as may be shown on the official plats and records of the County.

SECTION II. This ordinance shall become effective 15 days after the date of its enactment upon one publication in a newspaper in and having general circulation in Salt Lake County.

APPROVED and ADOPTED this 13th day of July, 1994.

APPROVED AS TO FORM
Salt Lake County Attorney's Office
By _____
Deputy County Attorney
Date 7/5/94

BOARD OF COUNTY COMMISSIONERS
OF SALT LAKE COUNTY

ATTEST:

By _____
Chairman

Salt Lake County Clerk

att.rt.unionvac.ksl

Commissioner Bradley voting "Nay"
Commissioner Horiuchi voting "Aye"
Commissioner Overson voting "Aye"

EXHIBIT L

Salt Lake County
Board of Commissioners

Jim Bradley CHAIRMAN
Randy Horiuchi
Brent Overson

SALT LAKE COUNTY

SALT LAKE COUNTY
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August 10, 1994

Ms. Katie L. Dixon
County Recorder
Government Center, North Bldg.
Salt Lake City, Utah

Dear Ms. Dixon:

The Board of County Commissioners, at its meeting held this day, approved the attached **CORRECTED ORDINANCE #1275 - vacating portions of North Union Avenue, 1035 East and 1115 East and Closing a Portion of North Union Avenue.**

The corrected ordinance vacates portions of North Union Avenue, 1035 East & 1115 East and permanently closing a portion of North Union Avenue. The original ordinance #1270 was approved July 13, 1994, and incorrectly described the portion of North Union Avenue being closed.

The ordinance has been published in a newspaper of general circulation.

Pursuant to the above, you are hereby authorized to place same on record for no fee and return the recorded document to the Commission Clerk.

Very truly yours,

BOARD OF COUNTY COMMISSIONERS

SHERRIE SWENSEN, COUNTY CLERK

by Isabelle Velasquez
Deputy Clerk

hfp
cc: Attorney/Kent Lewis
Attorney/Reiko
Public Works/Lonnie Johnson
Development Serv/Bill Marsh
U.S. Post Office
Address Program Support Office
1760 West 2100 South #130
SLC, UT 84199
encl.
Newspaper

CORRECTED ORDINANCE NO. 1275 DATE August 10, 1994
Superseding Ordinance No. 1270
Recorded in Book 6981, Page 0671

AN ORDINANCE VACATING PORTIONS OF NORTH UNION AVENUE, 1035 EAST AND 1115 EAST, AND PERMANENTLY CLOSING A PORTION OF NORTH UNION AVENUE, ALL WITHIN THE UNION FORT PLAT.

The Board of County Commissioners of Salt Lake County ordains as follows:

SECTION I. Vacation and Closure Ordinance No. 1275 is enacted as follows:

1. The following segments of North Union Avenue, 1035 East and 1115 East, within the Union Fort Plat, a subdivision recorded on January 13, 1857 in the Salt Lake County Recorder's Office, are hereby vacated:

> Beginning at the southeast corner of Lot 1, Block 9, Union Fort Plat, a subdivision recorded 13 January 1857 in the office of the Salt Lake County Recorder, and running thence North 17° East 12 rods; thence North 73° West 10 rods, more or less, to a point South 17° West 2 rods from the southwest corner of Lot 9, Block 12, Union Fort Plat; thence North 17° East 2 rods to said southwest corner of Lot 9, Block 12; thence South 73° East 32.5 rods to the southeast corner of Lot 1, said Block 12; thence South 17° West 2 rods, more or less, to the old fort wall; thence South 73° East 15.41 rods, more or less, to a point North 25° East 15 feet, more or less, from the northeast corner of Lot 23, Block 10, said Union Fort Plat; thence South 25° West 15 feet, more or less, to said northeast corner of Lot 23; thence North 73° West 33 rods to the northwest corner of Lot 13, said Block 10; thence South 17° West 12 rods to the southwest corner of Lot 12, said Block 10; thence South 73° East 40.91 rods, more or less, to the southwest corner of Lot 3, Block 11, said Union Fort Plat; thence South 17° West 13 rods to the southwest corner of Lot 6, Block 6, said Union Fort Plat; thence South 73° East 25.5 rods to the southeast corner of Lot 1, said Block 6;

thence South 31°48′ West 19.45 feet along the west line of 1300 East Street; thence North 73° West 30.11 rods, more or less, to a point South 17° West 0.14 rods, more or less, from the southeast corner of Lot 1, Block 7, said Union Fort Plat; thence North 17° East 12.14 rods, more or less, to the northeast corner of Lot 24, said Block 7; thence North 73° West 6 rods to the northeast corner of Lot 22, said Block 7; thence North 17° East 25 feet; thence North 73° West 12 rods; thence South 17° West 25 feet to the northwest corner of Lot 19, said Block 7; thence North 73° West 18 rods to the northwest corner of Lot 13, said Block 7; thence South 17° West 12 rods to the southwest corner of Lot 12, said Block 7; thence North 73° West 15 feet, more or less, to the old fort wall and the East line of 1035 East Street; thence North 17° East 15 rods, along said wall and said East line of 1035 East Street; thence North 73° West 4 rods to the point of beginning. Contains 2.01 acres, more or less, as described.

2. The following segment of North Union Avenue within the Union Fort Plat is hereby permanently closed:

Beginning at the northwest corner of Lot 19, Block 7, Union Fort Plat, a subdivision recorded 13 January 1857 in the office of the Salt Lake County Recorder and running thence South 73° East 12 rods to the northeast corner of Lot 22, said Block 7; thence North 17° East 25 feet; thence North 73° West 12 rods; thence South 17° West 25 feet to the point of beginning.

3. That the segment of North Union Avenue described in paragraph 2 is being closed rather than vacated in order that Salt Lake County may convey an access easement over said property to Hermes Associates Ltd., the adjacent property owner on the north, and to the owners of lots 3, 4, 5, 6, 19, 20, 21, and 22, Fort Union Plat, the adjacent property owners on the south ("south

property owners"), which will allow better access to their respective properties than by having the property revert as a matter of law, half to each by vacation; that the south property owners will still have direct access to 7240 South and will be provided additional access to the north side of the properties from 7240 South through a 25 foot wide public right-of-way which will be conveyed by Hermes Associates Ltd. to Salt Lake County. The 25 foot public right-of-way will revert to Hermes Associates, Inc. in the event it acquires the south properties.

4. The segments of the described streets being vacated include any additional area within the streets as they exist on the ground except as to the segment of North Union Avenue described in paragraph 2, which is being closed rather than vacated.

5. This ordinance is based upon a finding by the Board of County Commissioners that due and proper notice of the hearing to vacate the particular portions of said public highways was duly given according to law; that the segments of said public highways being vacated and the segment being closed are not needed as a public highway or a public right-of-way; that the vacation and closure will not be detrimental to the interest of Salt Lake County or to the general public; that neither the public nor any person will be materially injured thereby and that the vacation and closure of said highways accordingly is appropriate and should be done.

6. All right, title and interest in and to the said portion of said public highways being vacated is to revert by operation of

law to the abutting property owners or owners.

7. The Salt Lake County Recorder is hereby directed to record this ordinance and make the necessary changes on the official plats and records of the County to reflect the same.

8. This ordinance shall have no force or effect upon any easement or right-of-way for public utilities, holders of existing public franchises, water drainage easements, pipeline easements or other uses as presently exist under, over or upon the vacated portion of said public highways or as may be shown on the official plats and records of the County.

SECTION II. This ordinance supersedes Ordinance 1270 which incorrectly described the portion of North Union Avenue being permanently closed.

SECTION III. This ordinance shall become effective 15 days after the date of its enactment upon one publication in a newspaper in and having general circulation in Salt Lake County.

APPROVED and ADOPTED this 10th day of August, 1994.

BOARD OF COUNTY COMMISSIONERS
OF SALT LAKE COUNTY

By _____
Chairman

ATTEST:

_____
Salt Lake County Clerk

att.rt.wpdocs.unionamd.ksl

APPROVED AS TO FORM
Salt Lake County Attorney's Office
By _____
Deputy County Attorney
Date 11

Commissioner Bradley voting "Nay"
Commissioner Horiuchi voting "Aye"
Commissioner Overson voting "Aye"